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No. 06-

IN THE
Supreme Court of the United States

HYUNDAI MOTOR AMERICA, INC.,

Petitioner,

v.

SHANTE RAZOR,

Respondent.

Petition for a Writ of Certiorari to the Supreme Court of the State of Illinois

PETITION FOR A WRIT OF CERTIORARI

DENEAN K. STURINO
Counsel of Record
ADAM C. TOOSLEY
FAGELHABER, LLC
55 E. MONROE ST., 40TH FL.
CHICAGO, IL 60603
(312) 346-7500

WILFREDO HERNANDEZ, JR.
CORPORATE COUNSEL
HYUNDAI MOTOR AMERICA
10550 TALBERT AVE.
FOUNTAIN VALLEY, CA
92728-0850
(714) 594-1718

LINDA T. COBERLY
WINSTON & STRAWN LLP
35 W. WACKER DRIVE
CHICAGO, IL 60601
(312) 558-8768

November 22, 2006 *Counsel for Petitioner*

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D.C. 20001

QUESTIONS PRESENTED

Pursuant to authority delegated to it under the Magnuson Moss Warranty Act ("the Act"), the Federal Trade Commission ("FTC") has promulgated detailed regulations governing the disclosure of warranty terms and exclusions. Those regulations provide that exclusions in a warranty can be enforced so long as the warrantor has provided the warranty to the third-party seller. Given that warrantors (manufacturers) are not present at the retail sale, the regulations do not give the warrantor the responsibility of providing the warranty to the retail buyer.

The Supreme Court of Illinois has imposed an entirely new obligation on companies that warrant goods that are distributed in Illinois. Contrary to the FTC's regulations, the court held that an exclusion in a warranty is unconscionable and cannot be enforced if the warranty was not provided to the retail buyer before the sale. This case presents the following questions:

1. Whether the Act and the FTC regulations preempt applications of state contract law that impose greater pre-sale disclosure requirements on non-selling warrantors than those established by the FTC.

2. Whether the Illinois Supreme Court's requirement that warrantors who sell goods through independent, third-party Illinois sellers must provide written warranties directly to remote consumers, before a third-party sale, is an impermissible burden on interstate commerce and violates the Commerce Clause of the U.S. Constitution.

3. Whether a State's highest court may ignore the preemptive effect of federal law on grounds of waiver when the party that would have sought application of the preemption doctrine was never on notice that the State's highest court would create, *sua sponte*, a new, sweeping rule that would implicate preemption.

PARTIES TO THE PROCEEDINGS

Petitioner Hyundai Motor America, Inc., was the defendant-appellant below. Respondent Shante Razor was the plaintiff-appellee below.

RULE 29.6 STATEMENT

Petitioner Hyundai Motor America, Inc., is a wholly-owned subsidiary of a Korean corporation, Hyundai Motor Company. The stock of Hyundai Motor Company is traded publicly in South Korea.

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PETITION FOR A WRIT OF CERTIORARI

Hyundai Motor America, Inc. ("Hyundai") respectfully petitions for a writ of certiorari to review the judgment of the Illinois Supreme Court in this case.

INTRODUCTION

This case presents an important issue of federal preemption that could impact a wide variety of manufacturers and distributors who sell goods through third parties. The Illinois Supreme Court has imposed a new obligation on warrantors that squarely conflicts with the duties defined by the FTC in its regulations implementing the Act. In its decision in this case, the Court ignored contrary FTC regulations and held that a manufacturer or distributor that provides its warranty to the third-party seller on a timely basis cannot rely on the warranty's exclusions unless the warranty was also provided to the consumer before the sale. The ruling threatens to undermine the FTC's considered policies concerning the obligations of a warrantor—policies that have been essential in creating uniformity for manufacturers and distributors who do business throughout the United States. It also creates an impermissible burden on interstate commerce. This Court's intervention is necessary to remove this burden and clarify the obligation of state courts to recognize and give effect to FTC regulations on pre-sale availability of warranty terms in actions brought under the Act.

OPINIONS BELOW

The opinion of the First District Court of Appeals for the State of Illinois is reported at 349 Ill. App. 3d 651, and is reproduced in the appendix hereto ("App.") at 1a. Hyundai sought review in the Illinois Supreme Court, which granted review on or about November 24, 2004. The Illinois Supreme Court issued a decision on February 2, 2006. (App. 22a). Upon petition for rehearing, the Illinois Supreme Court modified its decision on June 29, 2006, and replaced its earlier

decision ("Modified Opinion"). The Modified Opinion is reported at 222 Ill. 2d 75 and reproduced at App. 52a. The Illinois Supreme Court dismissed Hyundai's Petition for Rehearing of the Modified Opinion, and the dismissal is reported at 2006 Ill. LEXIS 1625, Docket No. 98813 and is reproduced at App. 99a.

JURISDICTION

The Illinois Supreme Court's Modified Opinion was rendered on June 29, 2006. App. at 52a. On September 21, 2006, Justice Stevens granted petitioner's application for an extension of time within which to file a petition for a writ of certiorari up to and including November 24, 2006. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Supremacy Clause provides, in relevant part: "This Constitution, and the Laws of the United States * * *, shall be the supreme Law of the Land: and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. CONST. art. VI, cl. 2.

Magnuson Moss Warranty Act. The express preemption provision of the Act, 15 U.S.C. § 2302(b)(1)(A), reads as follows:

(b) Availability of terms to consumer; manner and form for presentation and display of information; duration; extension of period for written warranty or service contract

(1)

(A) The Commission shall prescribe rules requiring that the terms of any written warranty on a consumer

product be made available to the consumer (or prospective consumer) prior to the sale of the product to him.

15 U.S.C. § 2311(c) provides in pertinent part:

(c) State warranty laws.

(1) Except as provided in subsection (b) and in paragraph (2) of this subsection, a State requirement—

> (A) which relates to labeling or disclosure with respect to written warranties or performance thereunder;
>
> (B) which is within the scope of an applicable requirement of sections 102, 103, and 104 [15 USCS §§ 2302, 2303, and 2304] (and rules implementing such sections), and
>
> (C) which is not identical to a requirement of section 102, 103, or 104 [15 USCS § 2302, 2303, or 2304] (or a rule thereunder),

shall not be applicable to written warranties complying with such sections (or rules thereunder).

(2) If, upon application of an appropriate State agency, the Commission determines (pursuant to rules issued in accordance with section 2309 of this title) that any requirement of such State covering any transaction to which this chapter applies (A) affords protection to consumers greater than the requirements of this chapter and (B) does not unduly burden interstate commerce, then such State requirement shall be applicable (notwithstanding the provisions of paragraph (1) of this subsection) to the extent specified in such determination for so long as the State administers and enforces effectively any such greater requirement.

Code of Federal Regulations. 16 C.F.R. § 702 provides in pertinent part:

Pre-sale availability of written warranty terms.

The following requirements apply to consumer products actually costing the consumer more than $15.00:

(a) Duties of seller. Except as provided in paragraphs (c) through (d) of this section, the seller of a consumer product with a written warranty shall make a text of the warranty readily available for examination by the prospective buyer by:

(1) Displaying it in close proximity to the warranted product, or

(2) Furnishing it upon request prior to sale and placing signs reasonably calculated to elicit the prospective buyer's attention in prominent locations in the store or department advising such prospective buyers of the availability of warranties upon request.

(b) Duties of the warrantor. (1) A warrantor who gives a written warranty warranting to a consumer a consumer product actually costing the consumer more than $15.00 shall:

(i) Provide sellers with warranty materials necessary for such sellers to comply with the requirements set forth in paragraph (a) of this section, by the use of one or more by the following means:

(A) Providing a copy of the written warranty with every warranted consumer product; and/or

(B) Providing a tag, sign, sticker, label, decal or other attachment to the product, which contains the full text of the written warranty; and/or

(C) Printing on or otherwise attaching the text of the written warranty to the package, carton, or other container if that package, carton or other container is normally used for display purposes. If the warrantor elects this option a copy of the written warranty must also accompany the warranted product; and/or

(D) Providing a notice, sign, or poster disclosing the text of a consumer product warranty. If the warrantor elects this option, a copy of the written warranty must also accompany each warranted product.

STATEMENT

The Illinois Supreme Court, in its Modified Opinion on rehearing (App. 52a), created a different and greater standard for the distribution of written warranties than is required under the Act and FTC regulations implementing the Act. Moreover, the Court refused to consider the preemptive effect of the FTC's regulations at all, on waiver grounds, notwithstanding the fact that the conflict with the FTC's non-selling warrantor regulation arose for the first time when the Illinois Supreme Court issued its modified decision on rehearing. This is an important issue of national significance because the Act is interpreted and applied by every State, and differing approaches to the Act's and the CFR's preemptive effect could result in a significant erosion of the limited predictability and uniformity the Act creates in interstate commerce.

Hyundai placed its limited repair and replacement warranty in the glove box of Shante Razor's vehicle, and the warranty was in the vehicle upon delivery to the dealership. Under the applicable FTC regulations, Hyundai therefore fulfilled its duty under 16 CFR § 702(b)(i)(A) by delivering

the warranty with the product. Thus, under federal law, Hyundai was entitled to rely on, and enforce, the limitations of liability contained in that warranty.

The Illinois Supreme Court, however, has imposed a new and greater requirement. It held that warrantors (Hyundai) must present the warranty to the consumer before the sale in order to enforce the exclusions of the warranty, even if the warrantor is not present at the time of sale and sells through a third party. This requirement directly contradicts the Act and the FTC regulations, which provide that the seller, and not the warrantor, must deliver (or make available) the warranty to the consumer. Consequently, the Illinois Supreme Court has created a sharp divergence between its rule of law and the governing federal statutes and regulations, which preempt contrary state law.

The effect of the Illinois Supreme Court's decision is tremendous, and may impact all warrantors of goods sold by third-party sellers in Illinois. This Court should resolve these conflicts, reject Illinois' greater requirement as being preempted by federal law, and hold that Illinois' requirement violates the Supremacy and Commerce Clauses of the U.S. Constitution and the preemptive provisions of the Act and FTC regulations.

The Illinois Supreme Court's failure to give credence to the preemptive effect of the FTC's regulations in this case—despite specifically noting the regulations' existence—is itself a significant error of federal law. Here, the Illinois Supreme Court held, *for the first time on rehearing in its Modified Opinion*, that a non-selling warrantor cannot enforce an exclusion in a warranty unless the warranty was provided to the buyer before the sale. In doing so, it adopted a position never advanced by the plaintiff and never briefed by the parties. The Court was well aware of the contrary FTC regulations and even referred to them in its opinion,

acknowledging (as the dissent had pointed out) that the regulations distinguished between the obligations of the warrantor and the obligations of the seller. (App. 78a-80a). Nevertheless, the Court failed to acknowledge the preemptive effect of these regulations, on the ground that Hyundai had not anticipated its ruling and had not cited the specific regulation concerning non-selling warrantors in its briefing earlier in the case.

This approach to preemption cannot stand. Absent further review by this Court, courts throughout Illinois (and subsequently the United States) will be free to interpret the Modified Opinion of the Illinois Supreme Court as standing for a proposition that is directly at odds with an FTC regulation. Indeed, the resulting decision has already been cited elsewhere for the proposition that a non-selling warrantor must do more than comply with FTC regulations before it can enforce exclusions in its warranty. See *Long v. Monaco Coach Corp.*, 2006 U.S. Dist. LEXIS 62808, *21-22 (E.D. Tenn., Aug. 31, 2006). At a minimum, however, the decision stands for the proposition that a state court can disregard preemption simply by creating a new broad state law rule, *sua sponte*, without giving the parties notice that preemption is at issue and should be briefed.

1. Regulatory Background.

Congress passed the Act (which was originally entitled the Magnuson-Moss Warranty—Federal Trade Commission Improvement Act) in 1975 in response to an increasing number of consumer complaints regarding the inadequacy of warranties on consumer goods. *Davis v. Southern Energy Homes, Inc.*, 305 F. 3d 1268, 1272 (11th Cir. 2002), citing H.R. Rep. No. 93-1107 (1974), reprinted in 1974 U.S.C.C.A.N. 7702, 7705-11. Accordingly, Section 2310(d) of the Act provides a statutory private right of action to consumers "damaged by the failure of a supplier, warrantor,

or service contractor to comply with any obligation under this chapter, or under a written warranty, implied warranty, or service contract * * *." 15 U.S.C. § 2310(d)(1). Consumers may sue for a violation under the Act in either state or federal court. *Id.*

Four parts of the regulatory structure of the Act and the FTC regulations are important for determining this petition. First, in the Act, Congress gave the FTC the *exclusive* authority to interpret and promulgate rules regarding the pre-sale availability and disclosure of written warranties covered by the Act. 15 U.S.C. §2302(b)(1)(A) ("The Commission shall prescribe rules requiring that the terms of any written warranty on a consumer product be made available to the consumer (or prospective consumer) prior to the sale of the product to him").

Second, in accordance with the power vested by Section 2302(b)(1)(A), the FTC did, in fact, promulgate rules regarding the pre-sale availability of written warranty terms. On December 31, 1975, the FTC published Rule 702 (16 C.F.R. § 702) at 40 Fed. Reg. 60,168, which was amended on March 12, 1987, to provide sellers with specific guidelines on how to make warranty information available. Rule 702 states that sellers (such as automotive dealerships) must make the text of written warranties available to consumers, either upon request or by placing signage concerning its availability, but that a non-selling warrantor (like Hyundai) need only provide the warranty to the seller (the dealership) with the product. 16 C.F.R. § 702.3. These FTC regulations are clear and leave no room for state regulation on the issue.

Third, the Act provides that any state law regarding pre-sale disclosure of warranty terms that is different from Rule 702.3 is not enforceable against warranties that comply with the Act. 15 U.S.C. § 2311(c)(1). In other words, pre-sale disclosure and availability, in compliance with Rule 702.3,

should insulate warrantors (and sellers) from liability based on any differing requirements provided by individual states.

Fourth, the Act provides that before a warranty pre-sale disclosure requirement that differs from the FTC regulations can become effective, the following must take place: (1) the State, via an appropriate agency, must apply to the FTC for allowance of such a requirement; and (2) the FTC must determine that the different requirement both affords protection to consumers greater than its requirements and does not unduly burden interstate commerce. 15 U.S.C. § 2311(c)(2).

2. Factual Background.

This action arose from the purchase of a Hyundai Sonata by respondent, Shante Razor ("Razor"), which was sold by a dealership, Gartner Buick, Inc.—a non-party to this case. *Razor v. Hyundai Motor America*, 222 Ill. 2d at 78-79 (App. 54a). At the time of her purchase, Razor received Hyundai's New Vehicle Limited Warranty, which Hyundai had placed in the glove box of the vehicle upon delivery to the seller, Gartner Buick. *Id.* at 80. The warranty provided, in bold letters, that incidental and consequential damages were excluded. *Id.*

Although Razor's Sonata was repaired at no charge to her, she sued Hyundai for breach of warranty. *Id.* at 80-81. Her complaint sought relief under the Act, alleging breach of written warranty, breach of the implied warranty of merchantability, and revocation of acceptance. *Id.* Razor's complaint did not allege that the exclusion of incidental and consequential damages in Hyundai's warranty was unconscionable, or that the warranty was unfair to her or unconscionable. *Id.* at 105, fn. 4.

3. Trial Court Proceeding.

During the February 2003 trial, and over Hyundai's objection, the trial judge told the jury that it could award consequential damages if the plaintiff demonstrated that the warranty fails of its essential purpose—what has been deemed the "dependent approach" by courts in other jurisdictions.[1] Although the trial court stated, in connection with this ruling, that Hyundai's exclusion of consequential damages was unconscionable, Razor never introduced evidence on any of the elements of unconscionability, and the judge relied solely on the alleged failure of the warranty's essential purpose. No discussion was had about the pre-sale disclosure of the warranty, and no argument was presented by Razor that the warranty exclusions were unconscionable based on the fact that Hyundai did not show the warranty to her before she signed Gartner Buick's Retail Installment Contract.

At the trial, the jury returned a verdict for Razor, and despite Hyundai's exclusion to the contrary, awarded Razor, among other relief, incidental and consequential damages.

4. Intermediate Appellate Court Proceedings.

Hyundai appealed, arguing, among other things, that as a matter of law, Hyundai effectively disclaimed liability for consequential damages. With respect to the exclusion of consequential and incidental damages, Hyundai detailed the split of authority among jurisdictions as to whether a plaintiff must prove that such an exclusion is unconscionable before it will be negated.

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[1] See, e.g., *Soo Line R.R. Co. v. Fruehauf Corp.*, 547 F.2d 1365, 1373 (8th Cir. 1977) (applying Minnesota law); *Ragen Corp. v. Kearney & Trecker Corp.*, 912 F.2d 619, 625 (3d Cir. 1990); *Great Dane Trailer Sales, Inc. v. Malvern Pulpwood, Inc.*, 785 S.W.2d 13, 18 (Ark. 1990); *R.W. Murray, Co. v. Shatterproof Glass Corp.*, 758 F.2d 266, 272-73 (8th Cir. 1985).

The appellate court affirmed the judgment, including the award of consequential damages. (App. 1a). Following the minority position (the "dependent approach"), the appellate court held that because the limited warranty was said to be breached, the limited remedy failed of its essential purpose, and therefore, Hyundai's exclusion of consequential damages would not be given effect. *Id.* Again, no discussion was had about the pre-sale disclosure of the warranty, and no argument was presented by Razor that the warranty exclusions were unconscionable based on the fact that Hyundai did not show the warranty to her before she signed Gartner Buick's Retail Installment Contract.

5. Illinois Supreme Court Proceedings.

The Illinois Supreme Court's initial opinion was released on February 2, 2006. (App. 22a). In accordance with Hyundai's arguments, the Illinois Supreme Court held that plaintiffs in Illinois seeking to negate operation of an exclusion of consequential or incidental damages must prove, as a separate proposition from the "failure of essential purpose" determination, that the exclusion is unconscionable (the "independent approach"). (App. 36a). The question of whether to apply the independent or dependent approach was the issue upon which review was granted and, thus, was the focal point of the arguments made by both Hyundai and Razor in their briefs.

Then, in Section I(B) of the opinion, the Court performed a *sua sponte* unconscionability analysis, *on grounds not briefed by the parties*, and held that one factor—that the warranty was not included in Gartner Buick's purchase contract that was signed by Razor—made Hyundai's exclusion of consequential damages unconscionable. (App. 45a). This was the sole factor relied on in the analysis. (App. 45a).

Based on the Illinois Supreme Court's *sua sponte* finding that Hyundai's exclusions were unconscionable because the exclusions in the warranty were not part of the sales contract itself, Hyundai filed a Petition for Rehearing of the February 2, 2006 Opinion. (App. 45a). In that petition, Hyundai argued that the Illinois Supreme Court could not rely on the Retail Installment Contract between Razor and the non-party seller, Gartner Buick, as a basis for the Court's unconscionability analysis of Hyundai's limited warranty. (App. 100a). Specifically, it argued that (1) it was a material mistake of fact to consider Hyundai the "seller" (App. 103a); (2) Hyundai in fact had no involvement in the sale of the Sonata to Razor (App. 103a); and (3) Hyundai was not a party to the Retail Installment Contract. (App. 103a).

On June 29, 2006, the Illinois Supreme Court modified Section I(B) of its original February 2, 2006 opinion. (App. 52a). The Modified Opinion acknowledged that Hyundai was only the warrantor in the sales transaction involving Razor. (App. 76a-80a). Regardless, the Court established a new pre-sale disclosure rule by holding that Hyundai's exclusions can be held unconscionable when the exclusions are not shown to the consumer before a purchase contract is signed, even when, in cases such as this, the warrantor had no role in the sales transaction and provided the warranty to the seller for distribution to the ultimate consumer. (App. 76a). Though acknowledging that the FTC regulation requires only that the warrantor provide the warranty to the seller under the Act, the Illinois Supreme Court expressly declined to give effect to the federal regulation "sua sponte" because the Petition for Rehearing had not included a specific citation to the precise section of the FTC's regulations that sets out Hyundai's obligations as a non-selling warrantor. (App. 80a). The Court ignored the fact that when Hyundai filed its rehearing petition, it was not on notice that the Court would adopt a sweeping

new rule for pre-sale disclosure that would implicate all remote warrantors and distributors of goods in Illinois.

In an opinion dissenting in part from the denial of the rehearing, Illinois Supreme Court Justice McMorrow disputed any waiver of the issue of the preemptive federal regulation due to a lack of citation, and stated that the Court was using "an overly technical application of the waiver doctrine." (App. 91a). Noting that "this court allows successive petitions for rehearing where a majority opinion has been modified upon denial of rehearing," Justice McMorrow invited further briefing on the issues contained in her dissent. (App. 98a). In accordance with Justice McMorrow's recommendation, Hyundai filed a successive Petition for Rehearing on July 20, 2006, (App. 124a), but the Illinois Supreme Court dismissed the Petition without opinion or explanation. (App. 99a).

REASONS FOR GRANTING THE PETITION

This Court's review is necessary to overturn Illinois' judicial requirement that warrantors, manufacturers and distributors who distribute warranted products in Illinois can no longer rely on the FTC's regulations that set out their duty to disclose. Thus, these warrantors, manufacturers and distributors who warrant products in Illinois are now subject to a greater standard—one that is at odds with a consistent application of the Act and the federal regulations governing its enforcement. Because the provisions of the Act and FTC regulations provide that states cannot implement different standards or requirements, other than those included in the FTC regulations, without an "appeal" process being had with the FTC, Illinois' requirement is preempted.

Illinois has, in essence, required remote warrantors to perform a nearly impossible task—personally provide copies of their warranties to every consumer—despite the fact that that the warrantor is not typically involved in the sales

transaction. The FTC has wisely rejected this very requirement, specifically delineating the duties that a non-selling warrantor has in communicating its warranty provisions to a third-party seller. This case provides an ideal opportunity for this Court to provide guidance as to the preemptive effect of the FTC regulations. Indeed, this Court has, on many occasions, granted certiorari in cases in which state causes of actions or holdings were preempted by federal regulations. See, *e.g.*, *Gade v. National Solid Wastes Management Ass'n*, 505 U.S. 88 (1992) (cert. granted to decide whether Illinois' licensing acts for hazardous waste operators were preempted by the Occupational Safety and Health Act and OSHA regulations, and holding that that Illinois' acts were preempted); *Sprietsma v. Mercury Marine*, 537 U.S. 51 (2004) (cert. granted to decide whether state law claim in Illinois based on failure of boat engine manufacturer to protect the motor of a boat with a propeller guard was preempted by Coast Guard regulations and the Federal Boat Safety Act); *Norfolk S. Ry. v. Shanklin*, 529 U.S. 344 (2000) (cert. granted to decide whether Tennessee statutory and common law claims based on failure to maintain warning devices at railroad crossing were preempted by the Highway Safety Act of 1973 and Federal Highway Administration regulations). Hyundai respectfully requests that this Court do the same here.

Illinois' judicial requirement also violates the Commerce Clause. By requiring that remote warrantors who ship or distribute goods into Illinois perform a task that is not required on a federal level, the Illinois Supreme Court has impermissibly burdened interstate commerce. This Court's review is required on this basis as well.

I. The Illinois Supreme Court's Application Of State Law Is Preempted By FTC Regulations.

The preemption doctrine is rooted in the Supremacy

Clause of the Constitution, which mandates that "the Laws of the United States shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." *Orman v. Charles Schwab & Co.*, 179 Ill. 2d 282, 285 (1997), citing U.S. Const., art. VI, cl. 2; *Gibbons v. Ogden*, 22 U.S. 1 (1824); *Savage v. Jones*, 225 U.S. 501, 533 (1912); *California v. ARC America Corp.*, 490 U.S. 93, 101 (1989) ("A fundamental principle of the Constitution is that Congress has the power to preempt state law."). An act of Congress or regulatory law promulgated thereunder may supersede the statutory, regulatory, or common law of any state where that "[is] the clear and manifest purpose of Congress." *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504 (1992) (internal citations omitted).

"There are three ways federal laws and statutes can preempt state law: (1) when the language of the federal statute expressly preempts state law ('express preemption'); (2) when the scope of the statute indicates Congress intended federal law to occupy the field exclusively ('implied preemption'); or (3) when state law is in actual conflict with federal law ('conflict preemption')." *Sprietsma v. Mercury Marine*, 537 U.S. 51 (2002). The distinction between express or implied preemption is "whether Congress' command is explicitly stated in the statute's language or implicitly contained in its structure and purpose." *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977); *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 95 (1983); *Fidelity Fed. Sav. & Loan Assn. v. De la Cuesta*, 458 U.S. 141, 152-153 (1982).

Importantly, federal regulations have no less preemptive effect than federal statutes. "Where Congress has directed an administrator to exercise his discretion, his judgments are subject to judicial review only to determine whether he has exceeded his statutory authority or acted arbitrarily." *Capital*

Cities Cable v. Crisp, 467 U.S. 691, 699 (1984); *Fid. Fed. Sav. & Loan Ass'n*, 458 U.S. at 153-154.

In the Act, Congress expressly stated that the FTC was given the sole ability to promulgate and implement standards for the pre-sale availability and disclosure of warranty terms. The Act also provided that any law regarding pre-sale availability and disclosure that differed from the FTC's regulations is unenforceable. Because Illinois' judicial requirement that warrantors, as opposed to sellers, personally present its warranty to the consumer is different and greater than the FTC regulations, it is expressly preempted.

Section 2302(b)(1)(a) of the Act gives the FTC express rule-making authority relating to the pre-sale availability and disclosure of warranty terms. To that end, the FTC passed Rule 702.3 at 16 C.F.R. § 702.3, which specifically dictates how warranties subject to the Act must be disclosed. Rule 702.3 provides that a seller's responsibility in the pre-sale availability of the warranty is to make a text of the warranty readily available for examination by the prospective buyer by either displaying it in close proximity to the warranted product, or by furnishing the warranty, upon request, prior to sale and by placing signs in prominent locations in the store or department reasonably calculated to call prospective consumers' attention to the warranty. *Id.* On the other hand, the warrantor's responsibility is to provide sellers (dealerships) with warranty materials necessary for such sellers to comply with the requirements set forth in the section by performing one of four tasks, which include providing a copy of the warranty with every warranted consumer product.[2] *Id.*; See also Notice of Final Action, 64 Fed. Reg.

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[2] Rule 702.3 also provides that a warrantor can fulfill its pre-sale responsibilities by providing a tag, sign, sticker, label, decal or other attachment to the product, which contains the full text of the written warranty, printing on or otherwise attaching the text of the written

19,700, 19,701 (Federal Trade Commission, Apr. 22, 1999); Thomas J. Holdych and Bruce D. Mann, *The Basis of the Bargain Requirement: A Market and Economic Based Analysis of Express Warranties – Getting What you Paid For and Paying For What You* Get, 45 DePaul L. Rev. 781, 857 n107 (1999); Stephen E. Friedman, *Text and Circumstance: Warranty Disclaimers in a World of Rolling Contracts*, 46 Ariz. L. Rev. 677, 724 (Winter 2004) (warrantor's responsibility is limited to providing sellers with copies of the warranties for each product or attaching the warranty to the product, printing the warranty on the product's packaging, or providing a notice, sign, or poster, disclosing the text of the warranty).

Although the FTC promulgated distinct rules on the subject, Congress also provided that individual states may create their own pre-sale disclosure rules, which differ from Rule 702.3, only if the state, via an appropriate agency (e.g., Attorney General's Office), petitions the FTC first, and a determination is made that the different requirement both affords greater protection to consumers *and* does not unduly burden interstate commerce. 15 U.S.C. § 2311(c)(2).

The rules promulgated by the FTC pertaining to the Act have preemptive effect. See *American Financial Services Asso. v. FTC*, 247 U.S. App. D.C. 167 (D.C. Cir. 1985) ("The legislative history of the Magnuson-Moss Act and predecessor bills indicate that while Congress did not intend the Commission's regulations to 'occupy the field,' it did intend FTC rules to have that preemptive effect which flows naturally from a repugnancy between the Commission's valid enactments and state laws."). Further, both cases that have addressed the preemption issue have held that all state laws pertaining to the labeling or disclosure of written warranties

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warranty to the package, carton, or other container, and/or providing a notice, sign, or poster disclosing the text of the warranty.

and their terms under the Act are expressly preempted. See *Motor Vehicle Mfrs. Ass'n v. Abrams*, 899 F.2d 1315, 1319 (2d Cir. 1990) (State requirements relating "to labeling or disclosure with respect to written warranties or performance thereunder" are preempted by the Act); *Chrysler Corp. v. Armstrong*, 1985 U.S. Dist. LEXIS 20247, *2 (D. Ky. Apr. 30, 1985) (Section 2311(c)(1) of the Act is an "express preemption" section). See also Larry W. Kirby, *The Federal Consumer Warranty Act and Its Effect on State Law*, 43 Tenn. L. Rev. 429, 455 (1976) ("the FTC's disclosure rules preempt any state disclosure requirements that are within the scope of the rules and not identical to the rules' requirements."); 17 Am. Jur. 2d *Consumer Product Warranty Acts* § 13 (2006) ("Generally, any state law governing labeling or warranty disclosure or performance, which is within the scope of Magnuson-Moss Warranty Act sections and corresponding Federal Trade Commission regulations ... and which is not the same as the federal requirements, is not applicable to consumer product warranties complying with those standards.").

In two separate opinions issued shortly after the passage of the Act, the FTC held that state law requirements pertaining to disclosure of warranty terms which in any way differ from the FTC regulations are expressly preempted, unless the state petitions the FTC and receives permission to enforce the different requirements. See *Applicability of Certain Provisions of California State Law; Final Findings and Determination*, 42 Fed. Reg. 54,004 (Oct. 4, 1977) (a copy of which is attached hereto as App. 152a); *Preemptive Effect of Section 111(c)(1) of the Magnuson Moss Warranty Act*, 43 Fed. Reg. 50,737 (Oct. 31, 1978)(a copy of which is attached hereto as App. 178a).

In its 1977 Opinion, the FTC explained that a state law can provide for different pre-sale disclosure requirements for warranties only after the state has petitioned the FTC, and

only after a full determination is made that the requirement both affords greater protection to consumers *and* does not unduly burden interstate commerce. 42 Fed. Reg. 54,004. The FTC stated that, although state and federal consumer protection law is generally read harmoniously, if the state law frustrates the effectiveness of the federal law or when compliance with both laws is impossible, the laws conflict. *Id.* Even upon proper petition by the state, the state law requirement is preempted if: (1) the state requirement relates to "labeling or disclosure with respect to written warranties or performance thereunder"; (2) the state requirement is within the scope of section 102, 103, or 104, or "if it requires disclosure of terms in a written warranty in a manner different from the Federal rules"; and (3) the state requirement is different than the federal requirement. *Id.* at 54,005-54,006 (App. 160a-162a). The FTC held that a California requirement that sellers display a notice stating the existence of a warranty and a sample copy of the warranty was invalid because it differed from the federal regulation and because the "extra burden" was not justified by the potential benefit to consumers. *Id.* at 54,008 (App. 173a-174a).

Here, all three elements of Section 2311(c)(1) are squarely met. First, the Illinois Supreme Court's new pre-sale disclosure rule applies to "labeling or disclosure" of warranty terms, by requiring remote warrantors to provide a copy of the warranty to remote consumers before a purchase is consummated. Second, the pre-sale disclosure rule is within the scope of Section 2302 and requires disclosure of warranty terms in a manner different than federal law. And third, the pre-sale disclosure rule is different than Rule 702.3 in that warrantors must now perform a task other than making the warranty available to the seller. The State of Illinois has not petitioned the FTC under 15 U.S.C. § 2311(c)(2), and a determination as to whether the different requirement unduly

burdens interstate commerce or benefits consumers has not been had.

Without question, Hyundai complied with the written requirements of FTC Rule 702.3 by providing a copy of its written warranty to the seller in the subject transaction. However, the majority in the Illinois Supreme Court's Modified Opinion created a greater and different standard for the distribution of warranties than is required under the Act and Rule 702.3—that is, warrantors must provide its warranties to consumers, and not just to the sellers of the product, in order to rely on the exclusions or limitations contained within the warranties. This requirement was implemented by Illinois despite the fact that: 1) the State of Illinois did not petition the FTC regarding its new requirement; 2) the FTC has not allowed the new requirement; 3) the FTC has not determined that this different and elevated requirement affords greater protection to consumers; and 4) the FTC has not determined that this different and greater requirement does not unduly burden interstate commerce. Therefore, Illinois' requirement, on its face, is expressly preempted by the clear and plain language of the Act and the FTC regulations pertaining to the Act. Hence, the Illinois Supreme Court lacked the power to hold that Hyundai's exclusion was unenforceable based on its improper creation of a new, common law rule regarding pre-sale disclosure under the Act.

Further, the Illinois Supreme Court has enacted a rule in an area that Congress has stated that it did not intend for the States to legislate or control (pre-sale availability and disclosure of warranty terms), and by doing so, has left warrantors without predictability or uniformity in warranty administration, disclosure and liability relating to the disclosure of the warranty and the enforcement of its terms. (See Section II infra). As the leading authors on warranties have stated:

> A critical question under the Warranty Act is whether warrantors who market consumer products nationally may use in all states a uniform warranty that complies with federal law...most national warrantors have taken the position that state disclosure requirements that are not objectively identical to federal requirements are preempted by the Warranty Act; they use one uniform warranty.

Barkley Clark & Christopher Smith, *The Law of Product Warranties, Volume 2*, § 14:9 (2002). The Illinois Supreme Court's holding completely frustrates "the goal of national uniformity painstakingly designed by federal statute and regulation" in the Act. *Auto Importers of America, Inc. v. Minnesota*, 871 F.2d 717, 720 (8th Cir. 1989).

The Illinois Supreme Court's decision regarding the pre-sale availability and disclosure of warranty terms also contradicts the many cases that have held that Rule 702.3 expressly preempts state laws regarding the pre-sale availability of warranties or that a warrantor complies with Rule 702.3 by simply providing a copy of the warranty to the seller. See *Plagens v. Nat'l RV Holdings, Inc.*, 328 F. Supp. 2d 1068, 1076 (D. Ariz. 2004), reconsideration denied 2004 U.S. Dist. LEXIS 17346 (D. Ariz., June 17, 2004) (if a warrantor labeled the warranty "Limited Warranty," set forth the exclusions within the warranty, and provided the warranty to the seller (dealer) in compliance with 702.3, the exclusions are not invalid as to the warrantor simply because they were not disclosed to the purchaser before the sale); *Motor Vehicle Mfrs. Ass'n v. Abrams*, 899 F.2d at 1319 (State requirements relating "to labeling or disclosure with respect to written warranties or performance thereunder" are preempted by the Act); *Hahn v. Ford Motor Co.*, 434 N.E.2d 943, 953 (Ind. Ct.

App. 1982) (Ford properly disclaimed incidental and consequential damages by complying with FTC regulations).[3]

By holding that warrantors who comply completely with the FTC regulations and the Act cannot rely on the exclusions in their warranties, unless they perform a separate, and nearly impossible, act (interjecting itself into every third-party sale to show a consumer its warranty), the Illinois Supreme Court's decision subjects warrantors to inconsistent, and uncertain, obligations and hence, disrupts the regulatory scheme of the Act, the FTC regulations and interstate commerce. The breadth of this problematic, overreaching requirement established by Illinois' highest court *will surely affect companies' ability to do business* in Illinois, as its obligations are too burdensome and costly and unfairly shift the contractual rights afforded by the warranties from their true intention, i.e., repair or replace parts. Further, Illinois' pre-sale disclosure requirement can be interpreted to negate *all* exclusions, limitations, and disclaimers, thus rendering the limited warranty a full warranty; surely not the intention of limited warrantors or Congress or the understanding of consumers who receive "limited warranties." This Court should seize this opportunity to provide guidance to Illinois, and other courts, as to the preemptive nature of the Act and FTC regulations regarding pre-sale availability and disclosure of warranty terms.

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[3] Other cases have held in a similar manner. *Zabit v. Ferretti Group USA*, 2006 U.S. Dist. LEXIS 79039, *13, No. C 06-01252 JSW (N.D. Cal. October 23, 2006) (The "pre-sale rule" contemplated by the MMWA imposes "different duties on sellers and warrantors," and the "warrantor" is obligated to "provide sellers with warranty materials necessary for such sellers to comply with the requirements."' *Chrysler Corp. v. Armstrong*, 1985 U.S. Dist. LEXIS 20247 at *2 (Section 2311(c)(1) of the Act is an "express preemption" section); *Sennett v. Fleetwood Motor Homes of Cal., Inc.*, 2006 U.S. Dist. LEXIS 36969 (D. Ariz., June 2, 2006) (designating a warranty as a limited warranty was conspicuous and allowed defendant to rely on exclusions within warranty).

II. The New Pre-Sale Disclosure Rule Passed By The Illinois Supreme Court Violates The Commerce Clause.

This case also involves an important issue of federalism: The balance of authority between federal and state governments regarding an issue that clearly affects interstate commerce. The Supreme Court of Illinois has severely curtailed out-of-state warrantors' ability to conduct business in Illinois. This case will have significant effects for remote warrantors and manufacturers across the Country. By definition, it is a case that principally affects warrantors and manufacturers who are not present at the time of sale between an Illinois buyer and seller. Accordingly, this is exactly the kind of issue that should be left to Congress and the FTC to resolve.

"[T]he Commerce Clause contains an implied limitation on the power of the States to interfere with or impose burdens on interstate commerce." *Western & Southern Life Insurance Co. v. Board of Equalization*, 451 U.S. 648, 652 (1981). In order to determine if a regulation or rule is violative of the Commerce Clause, the following factors should be analyzed: "the nature of the state regulation involved, the objective of the state, and the effect of the regulation upon the national interest in the commerce." *Ark. Elec. Coop. Corp. v. Ark. Public Serv. Comm'n*, 461 U.S. 375, 390 (1983) (citation omitted). Although more latitude is generally given to state regulation when there is no direct Congressional regulation on point[4], there is an "infinite variety of cases, in which regulation of local matters may also operate as a regulation of [interstate] commerce, [and] in which reconciliation of the conflicting claims of state and national power is to be attained

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[4] In this case, there are direct Congressional regulations on point, which provide that Illinois' requirement is preempted. 15 U.S.C. §§ 2302(b)(1)(A), 2311(c) (See Section I).

only by some appraisal and accommodation of the competing demands of the state and national interests involved." *Southern Pacific Co. v. Arizona ex rel. Sullivan*, 325 U.S. 761, 768-769 (1945).

To that end, Congress may authorize or allow individual States to engage in regulation that the Commerce Clause would otherwise forbid (*Maine v. Taylor*, 477 U.S. 131, 137-138 (1986)), but only if the Commerce Clause exemption is "unmistakably clear," so as to assure that "all segments of the country are represented" in a decision to allow one State to affect persons or operations in other States. *South-Central Timber Dev., Inc. v. Wunnicke*, 467 U.S. 82, 91, 92 (1984).

The Act does not contain any indication at all, much less an "unmistakably clear" one, that Congress intended to allow individual States (such as Illinois) to regulate the obligations of remote warrantors and manufactures who ship goods into Illinois for sale by Illinois sellers. To the contrary, Section 2311 provides that any state rule or regulation that differs from its provisions (and consequently, the FTC regulations) is barred, unless an application is made to the FTC to find out whether the new rule or regulation does not unduly burden interstate commerce—exactly why the Commerce Clause was adopted in the first place. Nothing in the Act provides support or reason to suppose that Congress intended to authorize Illinois, and only Illinois, to erect a barrier to interstate commerce that would otherwise be forbidden by the Commerce Clause, by providing for a different, and more onerous, pre-sale disclosure rule in Illinois than is required in any other State. A proper analysis of the burden on interstate commerce suffered by warrantors due to this additional requirement has not been performed, and as such, the Illinois rule requires further review on this basis.[5]

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[5] As was the case with preemption, the Commerce Clause problem arose for the *first* time in the Illinois Supreme Court's *second* decision on

III. The Illinois Supreme Court Improperly Decided That Hyundai Waived The Preemption Argument.

Despite being fully aware of the FTC regulations at issue here, the Illinois Supreme Court nevertheless refused to consider them, on the ground that Hyundai had not specifically cited them in its previous briefs in the case. This approach to preemption and waiver itself presents a significant federal issue. Cf. *Int'l Longshoremen's Assoc., AFL-CIO v. Davis*, 476 U.S. 380, 388 (1986) ("Pre-emption, the practical manifestation of the Supremacy Clause, is always a federal question.").

Hyundai had no way of knowing that the Illinois Supreme Court would modify its February 2, 2006 opinion—which held that Hyundai's warranty exclusions were unconscionable because they were not included in Gartner Buick's *purchase contract*—to its current holding that the warranty exclusions are unconscionable because the *warranty itself* was never shown to Razor. Thus the preemption issue discussed above was not presented until after the court issued its Modified Opinion on June 29, 2006, creating the requirement that the warrantor actually provide the warranty to the buyer before the sale. The Court adopted this rule despite the dissent's specific discussion of the contrary regulations and the preemption problem. (App. 89a-94a). Under these circumstances, the Illinois Supreme Court could not simply ignore the contrary provisions of federal law on the ground that Hyundai's own briefing had not anticipated the court's sweeping *sua sponte* modification of its opinion on rehearing.

Indeed, even if the waiver of a preemption defense were not itself a matter of federal law, the Illinois Supreme Court's disposition would amount to a due process problem. The very essence of due process is the right to be heard before a

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rehearing. Thus the fact that the Commerce Clause issue was not briefed in that court is not a barrier to this Court's consideration of the issue.

judgment may be entered for or against a party. See *Boddie v. Conn.*, 401 U.S. 371, 377 (1971) ("[D]ue process requires, at a minimum, that absent a countervailing state interest of overriding significance, persons forced to settle their claims of right and duty through the judicial process must be given a meaningful opportunity to be heard"). This due process right includes the "opportunity to present every available defense." *Lindsey v. Normet*, 405 U.S. 56, 66 (1972) (quoting *Am. Surety Co. v. Baldwin*, 287 U.S. 156, 168 (1932)). Given the Illinois Supreme Court's approach, Hyundai was unfairly denied the opportunity to invoke preemption in opposition to the Illinois Supreme Court's decision.

There can be no doubt that the preemption issue is appropriate for this Court's review under these circumstances. This Court has held that if a federal issue (i.e., preemption) is created by an unexpected decision of the highest state court, giving the litigant no prior opportunity to anticipate or assert the issue, the fact that the federal issue is presented for the first time in a rehearing petition is sufficient to preserve the issue for Supreme Court review. See generally, *Richards v. Jefferson County, Ala.*, 517 U.S. 793, 797 n.3 (1996) (Federal issue of due process challenge to application of res judicata preserved for Supreme Court review when raised in petition for rehearing in Alabama Supreme Court); *Brinkerhoff-Faris Trust Co. v. Hill*, 281 U.S. 673, 677-78 (1983) (Due process claim raised at the first opportunity in Missouri Supreme Court on rehearing petition); *Saunders v. Shaw*, 244 U.S. 317, 320 (1917). (federal defense "was raised in time to serve as the basis of a writ of error from the Federal Supreme Court although it was first made in the assignment of errors filed with the chief justice of the state court shortly after that court had refused to consider an application for rehearing, since a party is not bound to contemplate a decision of the case before his evidence is heard, and therefore was not bound to ask a ruling or take other precautions in advance.") This Court

should take this opportunity to make clear that a State's highest court may not simply ignore issues of federal preemption on the ground that the parties had not anticipated the sweeping nature of the court's *sua sponte* ruling.

CONCLUSION

For the foregoing reasons, the petition should be granted and the case set for plenary review. In the alternative, and in view of the clear conflict between the Illinois Supreme Court's decision on rehearing and federal law, Hyundai also respectfully suggests that the Court consider a summary disposition, either summarily reversing the decision or granting, vacating, and remanding the judgment for further consideration in light of the FTC regulations.

Respectfully submitted,

DENEAN K. STURINO
Counsel of Record
ADAM C. TOOSLEY
FAGELHABER, LLC
55 E. MONROE ST., 40TH FL.
CHICAGO, IL 60603
(312) 346-7500

WILFREDO HERNANDEZ, JR.
CORPORATE COUNSEL
HYUNDAI MOTOR AMERICA
10550 TALBERT AVE.
FOUNTAIN VALLEY, CA
92728-0850
(714) 594-1718

LINDA T. COBERLY
WINSTON & STRAWN LLP
35 W. WACKER DRIVE
CHICAGO, IL 60601
(312) 558-8768

Counsel for Petitioner

APPENDIX

APPENDIX A

APPELLATE COURT OF ILLINOIS
FIRST DISTRICT, THIRD DIVISION

No. 1-03-1359

SHANTE RAZOR,
Plaintiff-Appellee,

v.

HYUNDAI MOTOR AMERICA,
Defendant-Appellant.

June 16, 2004, Decided

OPINION

JUSTICE KARNEZIS delivered the opinion of the court.

Plaintiff Shante Razor brought an action pursuant to the Magnuson-Moss Warranty—Federal Trade Commission Improvement Act (15 U.S.C. § 2301 et seq. (1994)) (Magnuson-Moss Act) and the Illinois New Vehicle Buyer Protection Act (815 ILCS 380/1 *et seq.* (West 2002)) seeking damages from defendant Hyundai Motor America for defendant's breach of its written warranty and implied warranty of merchantability on the new car it sold to plaintiff. The trial court entered judgment on a jury verdict in favor of plaintiff, awarding her actual and consequential damages.

Defendant argues on appeal that the court erred in failing to grant defendant's motion for judgment notwithstanding the verdict (judgment NOV), failing to reverse the jury's award of consequential damages, and awarding plaintiff attorney fees and costs. Defendant asserts that (1) plaintiff failed to prove damages, an essential element of her *prima face* case;

(2) plaintiff did not have a claim for breach of implied warranty under the Magnuson-Moss Act because there was no privity between plaintiff and defendant; (3) plaintiff had no claim for breach of limited warranty or implied warranty of merchantability because she failed to prove that an alarm/remote starter system not covered under defendant's limited warranty was not the cause of the car's problems; and (4) consequential damages should not have been awarded because defendant's limited warranty disclaimed liability for incidental and consequential damages. Defendant also asserts that, in the event this court reverses the trial court's judgment, the judgment awarding fees and costs must be reversed. We affirm.

BACKGROUND

On August 4, 2001, plaintiff purchased and took delivery of a new 2001 Hyundai Sonata GLS. She purchased the car from Gartner Buick, Inc. (Gartner), in Aurora, Illinois. It was manufactured and distributed by defendant. Defendant's new vehicle limited warranty covered the car for 60 months or 60,000 miles, whichever came sooner. The warranty provided the following coverage for the duration of the warranty:

> "Repair or replacement of any component originally manufactured or installed by Hyundai Motor Company or Hyundai Motor America (HMA) that is found to be defective in material or workmanship under normal use and maintenance, except any item specifically referred to in the section 'What is Not Covered.'

The warranty stated that, "in certain unique circumstances, Hyundai may decide, as a matter of goodwill, to pay for service or an item not normally covered by warranty." The owner's manual for the car warned that the car "should not be modified in any way" because "such modifications may violate conditions of the limited warranties covering the vehicle."

The "What is Not Covered" section of the warranty excluded coverage for damage or failure resulting from, among other things:

> "—Negligence of proper maintenance as required in the Owner's Manual.
>
> —Misuse, abuse, accident, theft, water/flooding or fire.
>
> —Use of improper or insufficient fuel, fluids or lubricants.
>
> —Use of parts other than Hyundai genuine parts, or parts of non-equivalent quality and design.
>
> —Any device or accessories not supplied by Hyundai.
>
> —Modifications, alterations, tampering or improper repair.
>
> —Parts or accessories used in applications for which they were not designed or not approved by HMA."

The "What is not Covered" section also stated "incidental or consequential damages, including without limitation, loss of time, inconvenience, loss of use of the vehicle or commercial loss."

Approximately one month after purchasing the car, plaintiff experienced problems starting it. She took it to Gartner for repair five times for the same problem.

On January 7, 2002, plaintiff filed a four-count complaint against defendant alleging that, "as a result of ineffective repair attempts by [defendant], through its authorized dealership network, the Sonata cannot be utilized for personal, family and household use as intended by Plaintiff at the time of acquisition." She stated that the car had been taken for repair of the same defect at least five times but that the defect remained uncorrected: Plaintiff asserted claims for (I) breach of written warranty under the Magnuson-Moss Act; (II) breach of implied warranty under the Magnuson-Moss Act;

(III) revocation of acceptance under the Magnuson-Moss Act; and (IV) violation of the Illinois New Vehicle Buyer Protection Act. Following an arbitration finding and award in favor of plaintiff, defendant rejected the award and the case proceeded to trial.

Plaintiff testified at trial that the Sonata was her first new car and that she bought it because she had heard good things about the car, she needed dependable transportation to get to and from work and "every place else" and the price was reasonable. When plaintiff bought the car, the salesman showed her a binder of options and features that could be installed in the car. Plaintiff elected to have a Professional Sound Installers, Inc. (ProSound), alarm/remote starter system installed in the car. The price of the system was included in the purchase price of the car.

Plaintiff took her new car home on August 4, 2001, but returned it to Gartner on August 30, 2001, to have the remote starter system installed. The odometer on the car read 1,944 miles. Gartner subcontracted the installation to ProSound and plaintiff got the car back the same day. Plaintiff did not know until she saw the work order for the installation that the system was made and installed by ProSound rather than Hyundai.

On September 26, 2001, when plaintiff attempted to start the car with her key, the car did not crank. She checked multiple things to make sure that she was not the cause of the failure to start, such as whether the gear shift was engaged, but could find no reason for the problem. She called roadside assistance and had the car towed to Gartner. The odometer on the car read 3,518 miles. Gartner's work order shows that when Gartner service technicians checked the car it started every time and they found no problems with the battery, cables and connections. Plaintiff received the car back that afternoon but missed a day of work as a result of having to take the car for repair.

On October 6, 2001, plaintiff brought the car into Gartner again, complaining that the car would not start when cold. The odometer on the car read 3,931 miles. Gartner checked the car and it started. Technicians found the starter was intermittently open and replaced it. They also performed an oil change free of charge. Gartner provided plaintiff with a loaner car during the two days her car was being serviced.

On October 16, 2001, plaintiff had the car towed to Gartner again, complaining that the car would "not crank sometimes." The repair order shows that technicians replaced a shorted "ECU power relay" but does not state that it was the cause of the problem. Gartner had the car for three days.

On October 25, 2001, plaintiff again brought the car in complaining that it would not start. The repair order states that technicians let the car "sit overnight several times" and that it started in the morning. Gartner had ProSound remove the alarm/remote started system and then again let the car sit overnight several times. The car started each time. ProSound then installed an updated remote system. The car continued to start when tested. Gartner had the car until November 12, 2001, and provided plaintiff with a rental car during the repair period.

On November 21, 2001, plaintiff again was unable to start the car. She testified that Gartner sent a technician to her home and that he was also unable to start the car. The technician had the car towed to Gartner and gave plaintiff his loaner car to use. At Gartner, technicians were unable to verify the no-start condition because the car started each time they tested it. They checked the car's wiring, connectors and ignition switch and replaced the starter relay and trans range switch. The car was returned to plaintiff on December 7, 2001.

Since December 7, 2001, plaintiff experienced no further problems with the car and, at the time of trial, continued to

own and operate the car. She testified that her confidence in the car had been significantly restored, she used it to make a 60-mile round trip to work five days a week and a 44-mile round trip to church on weekends and had driven it over 20,000 miles.

Plaintiff stated that she had never been in an accident with the car; it had never been vandalized, raced or flooded; she performed the required maintenance; and no one other than Gartner and its subcontractor, ProSound, had ever performed repairs on the car. Plaintiff testified that, having previously owned a used car, the Sonata did not provide her with the type of transportation she expected from "a brand new car." She expected it to be "perfect, flawless or minimal problems, certainly not the ones that I encountered here." Plaintiff would not purchase the car "today" because it had proven unreliable. She would not pay the price she paid because the problems she had with the new Sonata were akin to those she had with her previous car, which had been used and from which she had expected some problems. Plaintiff testified that "I would not pay that for a new car with used problems as it were." Plaintiff had not been charged for any of the repair work on the car or the cost of the loaner cars.

When plaintiff got the car back in November 2001 after having been without it for two weeks, she thought it was fixed. When she turned the key in the ignition on November 21 and nothing happened again, she "just broke down" and a Gartner service manager's statement to her that it must be something plaintiff was doing to cause the no-start problem "just aggravated the whole situation." Plaintiff stated that besides the aggravation, she was inconvenienced as a result of the car's problems because she missed work, was late for work, had to depend on other people when she did not have a loaner car, and had to wait for tows.

Plaintiff was the sole witness in her case. The court denied defendant's motion for a directed verdict and defendant called its only witness, Randall Wood, part-owner and treasurer of ProSound.

Wood testified that he had previously installed starter systems but did not personally work on plaintiffs car. He knew ProSound installed an alarm/remote starter system in the car and that plaintiff subsequently had problems starting the car. Wood stated that the original remote system in plaintiff's car included an anti-grind relay which prevented the car from starting if the ignition key was turned when the car had been locked with the remote control. When ProSound reinstalled the remote system in plaintiffs car, Wood instructed his installer to eliminate the anti-grind relay in order to eliminate the possibility that the car's failure to start was due to ProSound's installation. On reinstallation, Wood also had the tachometer wire, which monitors the car's engine and signals the remote to release the starter when the engine starts running, moved to a different location in the car in case it was unreliable and the cause of the failure to start. Wood also testified that the remote system might have a passive arming feature whereby, under certain conditions, the system would automatically rearm itself after 45 seconds and thereby prevent the car from starting.

At the close of evidence, the court denied defendant's motion for a directed verdict. The jury found in favor of plaintiff on the breach of written warranty and breach of implied warranty of merchantability counts, and awarded plaintiff $5,000 as breach of warranty damages, $3,000 for aggravation and inconvenience and $500 for loss of use. The jury found in favor of defendant on plaintiffs claim for breach of the Illinois New Vehicle Buyer Protection Act. Plaintiff abandoned her revocation of acceptance claim. The jury answered "yes" to a special interrogatory asking "Did plain-

tiff prove the aftermarket remote starter-alarm system was not the cause of the no-start condition?"

The court entered judgment for plaintiff on the jury verdict and denied defendant's posttrial motion for judgment NOV or, in the alternative, to vacate the consequential damage award. The court granted plaintiffs petition for fees and costs, awarding her $12,277 in addition to the $8,500 damage award. Defendant timely appeals.

ANALYSIS

STANDARD OF REVIEW

A court may enter a judgment NOV only when, viewing the evidence in a light most favorable to the nonmoving party, it so overwhelmingly favors the movant that a contrary verdict could not stand. *Alvarez v. American Isuzu Motors*, 321 Ill. App. 3d 696, 702, 749 N.E.2d 16, 22, 255 Ill. Dec. 236 (2001), citing *Pedrick v. Peoria & Eastern R.R.* Co., 37 Ill. 2d 494, 510, 229 N.E.2d 504, 513-14 (1967). A defendant's motion for judgment NOV presents" 'a question of law as to whether, when all of the evidence is considered, together with all reasonable inferences from it in its aspect most favorable to the plaintiffs, there is a total failure or lack of evidence to prove any necessary element of the plaintiff's] case.'" *Alvarez*, 321 Ill. App. 3d at 702, 749 N.E.2d at 22, quoting *Merlo v. Public Service Co.*, 381 Ill. 300, 311, 45 N.E.2d 665, 672 (1942). We review *de novo* the trial court's decision denying defendant's motion for judgment NOV. *Alvarez,* 321 Ill. App. 3d at 702, 749 N.E.2d at 22, citing *McClure v. Owens Corning Fiberglas Corp.,* 188 Ill. 2d 102, 132, 720 N.E.2d 242, 257, 241 Ill. Dec. 787 (1999).

FAILURE TO PROVE DAMAGES

Defendant first argues that the judgment must be reversed because plaintiff failed to prove damages, an essential element of her *prima facie* case for breach of warranty. Plaintiff

filed her action for breach of warranties pursuant to the Magnuson-Moss Act, which provides that "a consumer who is damaged by the failure of a supplier, warrantor, or service contractor to comply with any obligation under this chapter, or under a written warranty, implied warranty, or service contract, may bring suit for damages and other legal and equitable relief." 15 U.S.C. § 2310(d)(1) (1994). By implication, because the Magnuson-Moss Act does not address damages for breach of limited and implied warranties, the Uniform Commercial Code (UCC) (810 ILCS 5/1 *et seq.* (West 2002)) is used for such determinations. *Lara v. Hyundai Motor America*, 331 Ill. App. 3d 53, 61, 770 N.E.2d 721, 727, 264 Ill. Dec. 416 (2002).

Section 2-714 of the UCC provides that "the measure of damages for breach of warranty is the difference at the time and place of acceptance between the value of the goods accepted and the value they would have had if they had been as warranted, unless special circumstances show proximate damages of a different amount." 810 ILCS 5/2-714(2) (West 2000). The UCC also provides for incidental and consequential damages in proper cases. 810 ILCS 5/2-714(3) (West 2000). The special circumstances exception to section 2-714(2) must be read in conjunction with section 1-106 of the UCC (810 ILCS 5/1-106(1) (West 2000)), which provides that remedies found in the UCC "shall be liberally administered to the end that the aggrieved party may be put in as good a position as if the other party had fully performed." *Dynamic Recycling Services, Inc. v. Shred Pax Corp.*, 210 Ill. App. 3d 602, 615, 569 N.E.2d 570, 578, 155 Ill. Dec. 389 (1991).

Plaintiff presented evidence of the purchase price of the car, the car's chronic failure to start, the number of times the car was taken for repair and the amount of time she was without the car. She testified that the value of the car she received (a vehicle that intermittently failed to start) was less

than the value of the car she thought she was buying (a new car with no such problems, *i.e.*, a car that was capable of starting and being driven on demand). She testified that, if she had known at the time of purchase what she knew at trial, she would not have bought the car and would certainly not have paid the price she paid for a new car with used problems." She testified that she missed work and that she and her family suffered inconvenience and aggravation as a result of the car's failure to start. The jury found for plaintiff and awarded her damages for breach of the limited and implied warranties, loss of use and for aggravation and inconvenience damages.

Mathematical precision is not required in proof of loss, especially in the determination of consequential damages. *McCrady v. Chrysler Motors Corp.*, 46 Ill. App. 3d 136, 139-40, 360 N.E.2d 818, 821, 4 Ill. Dec. 705 (1977). Rather, the amount of damages is determined by the trier of fact in the exercise of sound discretion and in any manner reasonable under the circumstances, as long as the award is not punitive. *McCrady*, 46 Ill. App. 3d at 139-40, 360 N.E.2d at 821. "Where the right to recovery exists[,] the defendant cannot escape liability because the damages are difficult to prove." *Burrus v. Itek Corp.*, 46 Ill. App. 3d 350, 357, 360 N.E.2d 1168, 1172, 4 Ill. Dec. 793 (1977). Here, the court properly instructed the jury that plaintiff had to prove that she sustained damages as a proximate cause of defendant's breach and that the jury need not be mathematically precise in its damages determination and could use a "reasonable basis for damages." Based on its own experience and plaintiffs testimony, the jury could reasonably determine the difference between the value of the car as promised (a problem-free, reliable car capable of being driven at will) and the value of the car as plaintiff actually received it (an unreliable car, prone to not starting and, on such occasions, incapable of being driven), as well as incidental and consequential damages. We do not find "a total failure or lack of evidence to

prove" the damages element necessary to the plaintiffs case such that judgment NOV was warranted.

LACK OF PRIVITY

Defendant argues that plaintiff cannot state a claim for breach of implied warranty under the Magnuson-Moss Act because there is no privity between plaintiff and defendant. We recently considered and rejected this argument *in Mekertichian v. Mercedes-Benz U.S.A., L.L.C.*, (2004), 347 Ill. App. 3d 828, 807 N.E.2d 1165, 283 Ill. Dec. 324, 2004 Ill. App. LEXIS 327, and can summarily dispose of this issue.

The Magnuson-Moss Act provides that actions for breach of an implied warranty of merchantability may arise only under state law. 15 U.S.C. § 2301 (7) (1994); *Mekertichian*, 2004 Ill. App. LEXIS 327, at *5. Illinois state law regarding actions for breach of an implied warranty of merchantability is stated in section 2-314 of the UCC (810 ILCS 5/2-314 (West 2002)). A plaintiff must be in vertical privity of contract with the seller in order to file a claim for economic damages for breach of implied warranty under the UCC. *Mekertichian,* 2004 Ill. App. LEXIS 327, at *6, citing *Szajna v. General Motors Corp.*, 115 Ill. 2d 294, 311, 503 N.E.2d 760, 767, 104 Ill. Dec. 898 (1986), and *Rothe v. Maloney Cadillac, Inc.*, 119 Ill. 2d 288, 292, 518 N.E.2d 1028, 1029-30, 116 Ill. Dec. 207 (1988). Pursuant to the UCC, a buyer of goods seeking purely economic damages for a breach of implied warranty has "'a potential cause of action only against his immediate seller.'" *Mekertichian,* 2004 Ill. App. LEXIS 327, at *6, quoting *Rothe,* 119 Ill. 2d at 292, 518 N.E.2d at 1029. Therefore, pursuant to the UCC, plaintiff would only have a cause of action against Gartner and not against defendant.

However, in actions where (1) a consumer filed against a manufacturer pursuant to the Magnuson-Moss Act and (2) the manufacturer had expressly warranted a product to the con-

sumer, the privity requirement has been relaxed. *Mekertichian*, 2004 Ill. App. LEXIS 327, at *8, citing *Szajna*, 115 Ill. 2d at 315-16, 503 N.E.2d at 769, and *Rothe*, 119 Ill. 2d at 294-95, 518 N.E.2d at 1030. In such cases, "vertical privity will be deemed to exist with respect to that consumer, enabling him to file an action for breach of implied warranty (against the manufacturer] as well." *Mekertichian*, 2004 Ill. App. LEXIS 327, at *7 (manufacturer held in vertical privity with consumer where manufacturer provided limited written warranty with new automobile; pursuant to doctrine of *stare decisis,* Illinois Supreme Court decisions regarding state privity requirements under the Magnuson-Moss Act are binding on all Illinois courts where United States Supreme Court has not addressed the issue), following *Szajna,* 115 Ill. 2d at 315, 503 N.E.2d at 769, and *Rothe,* 119 Ill. 2d at 294-95 518 N.E.2d at 1030-31. Accordingly, because defendant provided a written limited warranty with the Sonata, it is deemed to be in vertical privity with plaintiff such that plaintiff has a cause of action for breach of implied warranty under the Magnuson-Moss Act.

BREACH OF LIMITED WARRANTY

Defendant argues that plaintiff failed to prove that defendant breached its limited warranty to repair and replace defective parts. Although the Magnuson-Moss Act requires a warrantor to specify whether a written warranty is a full or limited warranty (15 U.S.C. § 2303(a) (1994)), the Act only sets out minimum standards for full warranties (15 U.S.C. § 2304 (1994)). *Pearson v. Daimler-Chrysler Corp.*, 813 N.E.2d 230, 2004 Ill. App. LEXIS 331, at *11, 286 Ill. Dec. 173, No. 1-02-3051 (March 31, 2004), citing *Bartow v. Ford Motor Co.*, 342 Ill. App. 3d 480, 794 N.E.2d 1027, 276 Ill. Dec. 777 (2003), *Sorce v. Naperville Jeep Eagle, Inc.*, 309 Ill. App. 3d 313, 722 N.E.2d 227, 242 Ill. Dec. 738 (1999), and *Lara,* 331 Ill. App. 3d at 62. Limited warranties are, there-

fore, not governed by the Magnuson-Moss Act but by the UCC. *Pearson*, 2004 Ill. App. LEXIS 331, at *11.

Pursuant to section 2-719(2) of the UCC, "'where circumstances cause an exclusive or limited remedy [such as repair or replacement] to fail of its essential purpose, remedy may be had as provided in this Act.'" *Pearson,* 2004 Ill. App. LEXIS 331, at *11, quoting 810 ILCS 5/2-719(2) (West 2000). "The cases interpreting section 2-719(2) contemplate and impose a reasonableness standard" in determining whether a limited remedy failed of its essential purpose. *Pearson,* 2004 Ill. App. LEXIS 331, at *11. "A manufacturer does not have an unlimited time or an unlimited number of attempts to repair an automobile; rather, the limited warranty is breached and/or fails of its essential purpose if successful repairs are not made within a reasonable time or within a reasonable number of attempts." *Pearson*, 2004 Ill. App. LEXIS 331, at *14-15; see generally *Lara,* 331 Ill. App. 3d at 62, 770 N.E.2d at 728-29 ("A remedy limitation fails of its essential purpose when a seller unreasonably delays the replacement of the product, refuses to replace it at all, or is unsuccessful in correcting the defects 'within a reasonable time'"), quoting *Intrastate Piping & Controls, Inc. v. Robert-James Sales, Inc.*, 315 Ill. App. 3d 248, 257-58, 733 N.E.2d 718, 248 Ill. Dec. 43 (2000); *Nowalski v. Ford Motor Co.*, 335 Ill. App. 3d 625, 628 n.3, 781 N.E.2d 578, 581 n.3, 269 Ill. Dec. 781 (2002) (follows *Lara;* where a limited warranty is at issue, court must rely on UCC cases "holding the seller must correct the defects 'within a reasonable time'"); *Adams v. J.I. Case Co.,* 125 Ill. App. 2d 388, 403, 261 N.E.2d 1 (1970) (failure of exclusive remedy provided in warranty to repair and replace defective parts "readily, found in the allegation that defendants were wilfully dilatory or careless and negligent in complying with their obligations under the warranty").

In order to prove that defendant breached its written limited warranty on the Sonata, plaintiff had to prove:

> "(1) the existence of a defect in the automobile covered by the warranty; (2) compliance with the terms of the warranty by plaintiff; (3) plaintiff afforded defendant a reasonable opportunity to repair the defect; and (4) defendant was unable to repair the defect after a reasonable time or a reasonable number of attempts." *Pearson*, 2004 Ill. App. LEXIS 331, at *17-18.

The jury determined that plaintiff proved her case and we find some evidence to support this determination.

It is clear that a defect existed in the car given that the ordinary purpose for which a car would be used, *i.e.*, as a mode of transportation, would necessarily entail being able to start the car so that it can be driven. Although defendant argues that Gartner did not verify that the car would not start, the jury found plaintiffs testimony that the car would not start credible. Credibility of witnesses is for the trier of fact to determine. *Omni Partners v. Down*, 246 Ill. App. 3d 57, 64, 614 N.E.2d 1342, 1347, 185 Ill. Dec. 657 (1993). Moreover, given the unlikelihood that plaintiff would inflict on herself, her family and her employer the inconvenience and aggravation caused by having to take the car for repair numerous times without good reason, the jury's determination was reasonable.

The evidence supports the jury's apparent determination that plaintiff complied with the terms of the warranty. The warranty excludes coverage for damage or failure resulting from plaintiffs negligence of proper maintenance as required in the owner's manual. The manual prescribes that the first maintenance, an oil change, be performed after 6 months or 7,500 miles. The October 6 work order and plaintiffs testimony show that Gartner performed an oil change on the car two months after purchase and after plaintiff had driven the

car almost 4,000 miles, well prior to the required maintenance interval. Although the maintenance interval prescribed for vehicles "normally used under severe driving conditions" is 3 months/3,000 miles, it was not argued or shown that plaintiff drove the Sonata under such conditions and the shorter maintenance interval is inapplicable here.[1]

Coverage is also excluded for damage or failure resulting from

> "—Misuse, abuse, accident, theft, water/flooding or fire.
>
> —Use of improper or insufficient fuel, fluids or lubricants.
>
> —Use of parts other than Hyundai genuine parts, or parts of non-equivalent quality and design.
>
> —Any device or accessories not supplied by Hyundai.—Modifications, alterations, tampering or improper repair.
>
> —Parts or accessories used in applications for which they were not designed or not approved by HMA."

Plaintiff testified that she used the car to drive to work, church and run errands, which are all normal uses for a car; she had never been in an accident with the car; and that the car had never been vandalized, raced, off-roaded or flooded. This testimony negates "misuse, abuse, accident, theft, water/flooding or fire" as possible causes of the defect. There was no evidence that plaintiff failed to use proper or sufficient fuel, fluids or lubricants or genuine Hyundai parts or used parts and accessories in nonapproved ways or that such were the cause of the car's defect. The oil change and plaintiffs testimony that she tendered the car for repair only to Gartner,

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[1] "Severe driving conditions" include repeated short distance driving, extensive idling, driving in dusty rough roads, towing a trailer, driving in very cold weather, and more than 50% driving in heavy city traffic during hot weather above 90 [degrees] F.

Hyundai's approved dealer, leads to the inference any repairs were properly performed by Hyundai-approved personnel in Hyundai-approved applications with Hyundai-approved fluids, parts and materials.

There was also no evidence that the remote starter system, clearly a "device or accessory not supplied by Hyundai" and a "modification, alteration" to the car, was the cause of the car's failure to start. The jury specifically found that plaintiff proved that "the aftermarket remote starter-alarm system was not the cause of the no-start condition." There is some evidence to support this determination given that (a) the car did not exhibit the problem until plaintiff had driven 1,574 miles and 26 days with the starter system in place; (b) the car failed to start even after the system had been removed and replaced with an updated system; and (c) the problem with the car was not fully resolved until after Gartner replaced the starter relay and trans range switch in December, neither of which is apparently related to the remote starter system. The jury reasonably could conclude that plaintiff complied with the terms of the warranty.

Plaintiff was not required to prove the specific cause of the failure to start, only that the defect existed in materials or parts covered by the warranty, those originally manufactured or installed by Hyundai, and that there was no secondary cause for the defect. The above evidence that the problem continued after replacement of the remote starter and was not remedied until after replacement of the starter relay and trans range switch also supports the jury's apparent conclusion that the defect existed in the original parts.

It is uncontested that plaintiff tendered the Sonata for repair to Gartner within the period covered by defendant's limited warranty and gave Gartner ample opportunity to repair the vehicle.

The Sonata's defect, its failure to start, appeared to be repaired at the time of trial. However, the question remained whether it was repaired within a reasonable time or reasonable number of attempts. The jury found that defendant breached its limited warranty, necessarily finding that five repair attempts within four months of purchase, which resulted in plaintiffs being without her car and/or having to use a loaner car for approximately 39 days within that four-month time period, was unreasonable. Reasonableness is for the jury to determine. *Pearson,* 2004 Ill. App. LEXIS 331, at *19.

Given that there is evidence to sustain each necessary element of the plaintiffs action for breach of limited warranty, the trial court was correct in denying defendant's motion for judgment NOV on this count.

BREACH OF IMPLIED WARRANTY OF MERCHANTABILITY

Defendant also argues that plaintiff failed to prove breach of the implied warranty of merchantability. As previously stated, where, as here, the manufacturer expressly warrants a product to a consumer, the Magnuson-Moss Act imposes on manufacturers the same implied warranties that state law imposes on the buyer's immediate seller.

Mekertichian, 2004 Ill. App. LEXIS 327, at *6; see also *Cosman v. Ford Motor Co.*, 285 Ill. App. 3d 250, 255, 674 N.E.2d 61, 64, 220 Ill. Dec. 790 (1996), citing *Rothe*, 119 Ill. 2d 288, 518 N.E.2d 1028, 116 Ill. Dec. 207. State law, section 2-314(2)(c) of the UCC; provides that a product breaches an implied warranty of merchantability if it is not "fit for the ordinary purposes for which such goods are used." 810 ILCS 5/2-314(2)(c) (West 2000); *Alvarez*, 321 Ill. App. 3d at 702, 749 N.E.2d at 22. "With regard to automobiles, 'fitness for the ordinary purpose of driving implies that the vehicle should be in a safe condition and substantially free of

defects.'" *Lipinski v. Martin J. Kelly Oldsmobile, Inc.*, 325 Ill. App. 3d 1139, 1149, 759 N.E.2d 66, 74, 259 Ill. Dec. 586 (2001), quoting *Overland Bond & Investment Corp. v. Howard*, 9 Ill. App. 3d 348, 354, 292 N.E.2d 168, 172-73 (1972). Pursuant to section 2-725(2) of the UCC, an implied warranty of merchantability applies to the condition of the goods at the time of sale, not to their future performance. *Cosman*, 285 Ill. App. 3d at 257, 674 N.E.2d at 66; 810 ILCS 5/2-725(2) (West 2000).

In order to prove breach of an implied warranty of merchantability, plaintiff must prove that the Sonata was defective and that the defect(s) existed when the car left defendant's control. *Alvarez*, 321 Ill. App. 3d at 702-03, 749 N.E.2d at 22, citing *Cosman*, 285 Ill. App. 3d at 257, 674 N.E.2d at 66. Whether the defect existed at the time of delivery is for the trier of fact to determine. *Lipinski*, 325 Ill. App. 3d at 1151, 759 N.E.2d at 75.

Proof of a specific defect is not required. *Alvarez*, 321 Ill. App. 3d at 703, 749 N.E.2d at 22. Rather, a defect may be proven inferentially by direct or circumstantial evidence. *Alvarez*, 321 Ill. App. 3d at 703, 749 N.E.2d at 23, citing *Tweedy v. Wright Ford Sales, Inc.*, 64 Ill. 2d 570, 357 N.E.2d 449, 2 Ill. Dec. 282 (1976), and *Doyle v. White Metal Rolling & Stamping Corp.*, 249 Ill. App. 3d 370, 377, 618 N.E.2d 909, 915-16, 188 Ill. Dec. 339 (1993). "A *prima facie* case that a product was defective and that the defect existed when it left the manufacturer's control is made by proof that in the absence of abnormal use or reasonable secondary causes the product failed "to perform in the manner reasonably to be expected in light of [its] nature and intended function." "'*Alvarez*, 321 Ill. App. 3d at 703, 749 N.E.2d at 23, quoting *Tweedy*, 64 Ill. 2d at 574, 357 N.E.2d at 452.

The jury found that defendant breached its implied warranty of merchantability, impliedly finding the Sonata unmerchantable, and there is evidence to support this determination.

The car failed to perform in the manner reasonably to be expected in light of its nature and intended function as a mode of transportation when it periodically failed to start. A car that does not start and cannot be driven at will is clearly unmerchantable.

The question thus becomes whether the defect existed when the car left defendant's possession and control. A malfunction need not occur immediately upon purchase of the vehicle but can be inferred to exist at the time the car left the defendant's control through evidence of reasonable and proper handling of the car in the interim period between leaving the defendant's possession and control and manifestation of the malfunction. *Alvarez*, 321 Ill. App. 3d at 704, 749 N.E.2d at 24. "'Proof of a malfunction during normal use which tends to exclude other extrinsic causes is sufficient to make *a prima facie* case on the issue of the existence of a defective condition.'" *Alvarez*, 321 Ill. App. 3d at 704, 749 N.E.2d at 24, quoting *Johnson v. Amerco, Inc.*, 87 Ill. App. 3d 827, 830, 409 N.E.2d 299, 303, 42 Ill. Dec. 684 (1980).

Plaintiff demonstrated that the malfunction occurred in the absence of abnormal use or reasonable secondary causes. Her testimony that (a) she used the car only to drive to work, church and run errands, all normal uses; (b) that it had never been vandalized, raced, off-roaded or flooded; and (c) she got an oil change two months after purchase demonstrates the absence of abnormal use. Similarly, the October oil change eliminates failure to maintain as a reasonable secondary cause of the car's failure to start, especially since the problem started only a month after plaintiff purchased the car, well prior to the 6-month/7,500-mile maintenance interval prescribed by defendant for compliance with the terms of its warranties.

The most likely secondary cause was the installation of the remote starter system three weeks after Plaintiff bought the car because plaintiff did not experience the nostart problems

until after the system was installed. However, as stated previously, there is evidence to support the jury's determinations that plaintiff proved that "the aftermarket remote starter-alarm system was not the cause of the no-start condition." Accordingly, given that a car's failure to start is unarguably a failure to perform in the manner reasonably to be expected in light of its nature and intended function and plaintiff presented evidence eliminating abnormal use and reasonable secondary causes as the reason for the failure to start, plaintiff made *a prima facie* case that the Sonata was defective and that the defect existed when it left the manufacturer's control. The court did not en in denying defendant's motion for judgment NOV on the breach of implied warranty of merchantability count.

CONSEQUENTIAL DAMAGES

Defendant lastly argues that the court erred in entering judgment on the jury award of consequential damages because the limited warranty specifically excluded recovery for incidental and consequential damages. However, where a contract limits a remedy to repair and/or replacement of defective parts or goods and the remedy failed in its essential purpose, a provision excluding incidental and consequential damages will have no effect and those damages will be available to the plaintiff pursuant to the UCC. *Lara*, 331 Ill. App. 3d at 63, 770 N.E.2d at 729. "A remedy limitation fails of its essential purpose when a seller unreasonably delays the replacement of the product, refuses to replace it at all, or is unsuccessful in correcting the defects 'within a reasonable time.'" *Lara*, 331 Ill. App. 3d at 62, 770 N.E.2d at 728-29, quoting *Intrastate*, 315 Ill. App. 3d at 257-58. In finding that defendant breached its limited warranty, the jury necessarily found that defendant failed to perform the repairs within a reasonable number of attempts or within a reasonable time. Given that there was evidence to support the jury's determination, defendant's limited warranty of repair or replace-

ment of defective parts failed of its essential purpose and defendant's exclusion of incidental and consequential damages under the same contract will not be enforced. The court did not err in entering judgment on the jury's award of such damages.

ATTORNEYS' FEES AND COSTS

The trial court awarded attorneys' fees and costs to plaintiff as the prevailing party. Pursuant to Section 2310(d)(2) of the Magnuson-Moss Act, such an award is within the trial court's discretion and will not be disturbed on review absent an abuse of that discretion. *Cannon v. William Chevrolet/Geo, Inc.*, 341 Ill. App. 3d 674, 685, 794 N.E.2d 843, 852, 276 Ill. Dec. 593 (2003); 15 U.S.C. § 2310(d)(2) (2000). Given that we affirm the trial court's judgment in favor of plaintiff on the breach of warranty claims and defendant does not argue that the fees and/or costs are excessive, we affirm the court's award of attorneys' fees and costs.

For the reasons stated above, we affirm the decision of the trial court.

Affirmed.

HOFFMAN, *P.J.*, and HALL, *J.*, concur.

APPENDIX B

IN THE
SUPREME COURT OF THE STATE OF ILLINOIS

[Filed FEB 2, 2006]

Docket No. 98813

SHANTE RAZOR,

Appellee,

v.

HYUNDAI MOTOR AMERICA,

Appellant.

Opinion filed February 2, 2006.

JUSTICE FREEMAN delivered the judgment of the court, with opinion.

Chief Justice Thomas and Justices McMorrow, Fitzgerald, Kilbride, Garman, and Karmeier concurred in the judgment and opinion.

OPINION

This appeal involves the federal Magnuson-Moss Warranty-Federal Trade Commission Improvement Act (Act) (15 U.S.C. §2301 *et seq.* (2000)) and the Illinois Uniform Commercial Code (UCC) (810 ILCS 5/1-101 *et seq.* (West 2000)). The only issues raised concern the propriety of the damages awarded to the plaintiff. The primary question is whether the circuit court acted properly in refusing to enforce a contractual clause prohibiting the award of consequential damages. There is also a sufficiency of the evidence challenge to the court's award of warranty damages. We affirm in part, reverse in part, and remand.

BACKGROUND

Plaintiff Shante Razor purchased a new Hyundai Sonata from Gartner Buick, Inc. (Gartner), on August 4, 2001. At the time she purchased the car, plaintiff also bought an optional remote starter and alarm system from an "options" booklet shown to her by the Gartner salesman. Gartner subcontracted the installation of this starter to Professional Sound Installers (ProSound). ProSound did not install it on the date plaintiff purchased her vehicle, but a few weeks later, on August 30, 2001.

The Sonata was the first new car plaintiff had ever purchased. It came with a five-year, 60,000-mile warranty, a copy of which was introduced into evidence. In pertinent part, the warranty provided as follows:

> "WHAT IS COVERED
>
> Repair or replacement of any component originally manufactured or installed by Hyundai Motor Company or Hyundai Motor America (HMA) that is found to be defective in material or workmanship under normal use and maintenance, except any item specifically referred to in the section `What is Not Covered.'
>
> * * *
>
> WHAT IS NOT COVERED
>
> * Damage or failure resulting from:
>
> —Negligence of proper maintenance as required in the Owner's Manual.
>
> —Misuse, abuse, accident, theft, water/flooding or fire.
>
> * * *
>
> —Any device and/or accessories not supplied by Hyundai.

* * *

*INCIDENTAL OR CONSEQUENTIAL DAMAGES, INCLUDING WITHOUT LIMITATION, LOSS OF TIME, INCONVENIENCE, LOSS OF USE OF THE VEHICLE, OR COMMERCIAL LOSS.

*The duration of any implied warranties, including those for MERCHANTABILITY and FITNESS FOR A PARTICULAR PURPOSE, are limited to the duration of this limited warranty.

Some states do not allow limitations on how long an implied warranty lasts, or the exclusion or limitation of incidental and consequential damages, so the limitations or exclusions set forth regarding this limited warranty may not apply to you. You may also have other rights which vary from state to state."

In late September 2001, plaintiff began experiencing difficulties with the vehicle. On September 26, plaintiff had the vehicle towed to Gartner for service because it failed to start when she turned the key. She experienced the same problem and again had the vehicle towed to Gartner for service on October 6, October 16, and October 25. On the latter occasion, Gartner kept the vehicle for more than two weeks, providing plaintiff with a rental car to use during the time the vehicle was out of her possession. Nevertheless, the problem happened again on November 21, the day before Thanksgiving, when plaintiff had taken the day off from work to go shopping for the holiday. After a technician came to her home and was himself unable to start the car, the vehicle was yet again towed to Gartner for attempted repairs.

Sometimes after being towed to Gartner the vehicle started normally, other times it did not. Gartner technicians attempted various different repairs on the different occasions that the car appeared before them, including replacing the starter, replacing the "ECU power relay," replacing the

remote starter with an updated system, and replacing the "trans range switch" and "starter relay." Additionally, after the October 25 no-start, when the vehicle was kept for more than two weeks, Pro Sound removed the remote starter it had originally installed on plaintiff's vehicle and replaced it with an updated model. Plaintiff was not charged for any of the attempted repairs.

In December 2001, plaintiff filed suit against defendant, Hyundai Motor America (Hyundai). Plaintiff made claims against Hyundai pursuant to the Magnuson-Moss Warranty Act (15 U.S.C. §2301 *et seq.* (2000)) for breach of written warranty and breach of implied warranty of merchantability. Plaintiff also alleged that Hyundai had violated the Illinois New Vehicle Buyer Protection Act (815 ILCS 380/1 *et seq.* (West 2000)).

The case initially went to arbitration. The arbitration panel found in plaintiff's favor, and entered an award of $6,500, plus attorney fees and costs. Hyundai rejected this award and demanded trial.

The case went to trial in February 2003. Plaintiff was the sole witness for her case, and most of the above undisputed facts are drawn from her testimony. In addition, plaintiff testified that she never saw the actual warranty until after she had purchased the car, because the warranty was contained in the owner's manual, which she saw for the first time in the glove box of her vehicle when she drove it off the lot. Plaintiff's purchase contract, a copy of which was introduced into evidence, does not appear to contain or refer to the vehicle warranty. When asked on cross-examination if she had seen the warranty on a placard at Gartner Hyundai, plaintiff testified that she had not. Plaintiff testified that she had performed all required maintenance on her car, had never been in an accident or been the victim of vandalism, and that no one other than Gartner Hyundai had ever performed any repairs on the vehicle.

During plaintiff's direct examination, defense counsel objected when plaintiff's counsel inquired regarding her purchase of prior automobiles. During a lengthy sidebar, counsel explained that he was attempting to lay a foundation in order to ask her how much the car's value to her had decreased because of the problems she had with it. The court ruled that plaintiff could not answer such a question. The court indicated that plaintiff could testify "as to what her feelings were, what her frame of mind was and the impact of the slow [*sic*] start situation on her personal feelings. * * * But as to 'the value of the vehicle would have been such and such because of the no start conditions,' I don't see how you're going to go that far with it." Plaintiff was permitted to testify that the purchase price of her Sonata was $16,522, and that she would eventually have paid a total of $21,249 for the car, including finance charges.

Plaintiff testified that the vehicle did not provide her the type of transportation she expected. She testified, "[I]t's a brand new car. I expected it to be perfect, flawless or minimal problems, certainly not the ones that I encountered here." She testified that she would not purchase the same vehicle today, because it was "proven unreliable," and she would not today pay the price she had originally paid for the vehicle, because "given the problems that this vehicle—that I have had with this vehicle or the problems the vehicle has had, that's like a used car. I would not pay that for a new car with used problems as it were." Plaintiff also testified that the problems she had with the car had caused her considerable inconvenience, including missing days of work. However, on cross-examination, plaintiff admitted she was still driving the car at the time of trial-May 2003-and had not experienced any difficulties with it since December 2001.

Plaintiff offered her exhibits into evidence and rested. Hyundai moved for a directed verdict, which the court denied in its entirety. During argument on the motion, the court

initially ruled that Hyundai's disclaimer of incidental and consequential damages was not unconscionable, but shortly thereafter the court reversed itself and ruled that the disclaimer was unconscionable and would not be enforced. When defense counsel inquired of the court as to the basis for its ruling that the disclaimer was unconscionable, the court responded:

> "THE COURT: The number of attempts that the plaintiff attempted for repairs. The fact that the plaintiff needed, used or intended to use the vehicle for transportation to and from work. The fact that the plaintiff was unable to use the vehicle for the time period in question for it's [*sic*] intended use."

After the court denied Hyundai's motion for a directed verdict, the defense called its sole witness, Randy Wood. Wood is treasurer and part owner ofProSound, the company which installed plaintiff's alarm and remote starter system. He testified that ProSound had inspected the system installed on plaintiff's vehicle on more than one occasion, and no problem was ever found. Although ProSound did replace plaintiff's system with the newest model, this was for customer satisfaction purposes only, because ProSound never found anything wrong with plaintiff's system. He did admit on redirect examination that plaintiff's vehicle "may have" had a weak signal coming through its "tack [*sic*] wire," and if that condition existed it could cause problems for the ProSound system. Wood also testified that the system could itself prevent the car from starting, if one attempted to start it with the key after locking the car with the remote control.

After the defense rested, Hyundai renewed its motion for a directed verdict, including specifically arguing that the court should not have reversed its initial conclusion regarding the enforceability of the consequential damages disclaimer. The court denied Hyundai's motions and submitted the case to the jury.

The jury returned a verdict for plaintiff on the breach of warranty claims, awarding her $5,000 in warranty damages for the diminished value of the Sonata due to the defects, and $3,500 in consequential damages for aggravation and inconvenience and loss of use. The jury also answered "yes" to a special interrogatory which asked, "Did plaintiff prove the aftermarket remote starter-alarm system was not the cause of the no-start condition?" The jury found in defendant's favor, however, on plaintiff's claim under the New Vehicle Buyer Protection Act. The court awarded plaintiff $12,277 in attorney fees and costs.

The appellate court affirmed in all respects. 349 Ill. App. 3d 651.

Hyundai petitioned for leave to appeal to this court (see 155 Ill. 2d R. 315(a)), which we granted.

ANALYSIS

Before this court the issues have been pared down. Hyundai neither challenges the jury's conclusions regarding causation nor contends that plaintiff failed to prove that the warranty failed of its essential purpose. Plaintiff does not cross-appeal the jury verdict in Hyundai's favor on her New Vehicle Buyer Protection Act claim. Neither party raises any issues regarding the circuit court's conduct of the trial.

Rather, the arguments now focus exclusively on damages. Hyundai first argues that the circuit court erred in refusing to enforce the contractual exclusion of incidental and consequential damages. Hyundai argues that the mere fact that its warranty failed of its essential purpose does not invalidate the consequential damages disclaimer, and contends that plaintiff introduced no evidence to support the circuit court's ruling that the disclaimer should not be enforced. Second, Hyundai contends that there was insufficient evidence to support the jury's warranty damage award. Finally, Hyundai argues that if this court reverses both damage awards, we must also

reverse the circuit court's award of fees and costs. Plaintiff raises no additional arguments. Thus, these are the only issues before us.

I. Enforceability of Hyundai's Disclaimer of Incidental/Consequential Damages

The main issue before this court is the enforceability of Hyundai's disclaimer of incidental and consequential damages. Hyundai argues that the disclaimer is independent of the limited remedy, and the disclaimer may stand even if its limited remedy failed of its essential purpose. Hyundai contends that the disclaimer may be overridden only if it is itself unconscionable, a standard which Hyundai argues has not been met in the instant case. Plaintiff responds that the disclaimer should fall with the limited warranty, and contends that even if this court finds them to be severable, the disclaimer in this case was unconscionable.

A. *"Independent" vs. "Dependent" Approach to Provisions Limiting Remedy and Excluding Consequential Damages*

As previously noted, plaintiff's claim was brought under the Magnuson-Moss Warranty Act (15 U.S.C. §2301 *et seq.* (1994)). Under the Act, consumers who have been damaged by any warrantor's failure to comply with its obligations under a written warranty may bring suit "in any court of competent jurisdiction in any State or the District of Columbia." 15 U.S.C. §2310(d)(1)(A) (1994).

The Act itself does not determine the enforceability of the consequential damages disclaimer, however. The Act does supersede state law, but only to the extent that state law is inconsistent with the Act. 15 U.S.C. §2311 (1994); see *Sorce v. Naperville Jeep Eagle*, 309 Ill. App. 3d 313, 323 (1999). The warranty at issue in this case was a limited warranty, and the Act does not set out requirements for limited warranties.[1]

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[1] The Act does permit the Federal Trade Commission to establish general disclosure requirements for the terms and conditions of all warranties,

Rather, the Act merely prescribes certain requirements with which warranties must comply in order to be called "full" warranties. See 15 U.S.C. §2303(a) (1994) (a warranty which meets the standards set forth in section 4 of the Act (15 U.S.C. §2304 (1994)) "shall be conspicuously designated a `full (statement of duration) warranty,'" and a warranty which does not meet the standards set out in section 4 of the Act "shall be conspicuously designated a `limited warranty' ").

Accordingly, to determine the enforceability of a consequential damages disclaimer in a limited warranty, we look to state law. See *Lara v. Hyundai Motor America*, 331 Ill. App. 3d 53, 62 (2002); *Sorce,* 309 Ill. App. 3d at 325. In Illinois, the sale of goods is governed by article 2 of the Uniform Commercial Code (UCC). 810 ILLS 5/1-101 *et seq.* (2000). Central to this case is section 2-719 of the UCC, which governs "Contractual modification or limitation of remedy":

> "(1) Subject to the provisions of subsections (2) and (3) of this Section and of the preceding section on liquidation and limitation of damages,
>
> (a) the agreement may provide for remedies in addition to or in substitution for those provided in this Article and may limit or alter the measure of damages recoverable under this Article, as by limiting the buyer's remedies to return of the goods and repayment of the price or to repair and replacement of nonconforming goods or parts; and
>
> (b) resort to a remedy as provided is optional unless the remedy is expressly agreed to be exclusive, in which case it is the sole remedy.

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e.g., that they must clearly identify the warrantors, the warrantees, the products or parts covered, etc. *See* 15 U.S.C. §2302 (1994). However, the Act itself does not directly establish any such disclosure requirements, nor do the parties raise any arguments regarding any requirements the FTC may have established.

(2) Where circumstances cause an exclusive or limited remedy to fail of its essential purpose, remedy may be had as provided in this Act.

(3) Consequential damages may be limited or excluded unless the limitation or exclusion is unconscionable. Limitation of consequential damages for injury to the person in the case of consumer goods is prima facie unconscionable but limitation of damages where the loss is commercial is not." 810 ILCS 5/2-719 (West 2000).

In this case, Hyundai's limited warranty contained both a limitation of remedy and an exclusion of consequential damages. The warranty expressly limited the buyer's remedies to repair and replacement of nonconforming parts, as permitted under section 2-719(1)(a). However, the warranty additionally provided that incidental or consequential damages were "not covered," as permitted under section 2-719(3).

Plaintiff claimed-and the jury found-that the Hyundai limited remedy had failed of its essential purpose because of the persistence of the no-start problem with plaintiff's car. Hyundai does not question this factual determination in this appeal. Thus, according to section 2-719(2) of the UCC, plaintiff was entitled to remedy "as provided in this Act." 810 ILCS 5/2-719(2) (West 2000). *See also* 810 ILCS Ann. 5/2-719, Uniform Commercial Code Comment 1, at 488 (Smith-Hurd 1993) ("under subsection (2), where an apparently fair and reasonable clause because of circumstances fails in its purpose or operates to deprive either party of the substantial value of the bargain, it must give way to the general remedy provisions of this Article").

This does not end the inquiry insofar as consequential damages are concerned, however. Subsection (3) of section 2-719 is part of "this Act"—*i.e.*, the UCC-and subsection (3) permits a seller to limit or exclude consequential damages unless

to do so would be unconscionable. It still must be determined, therefore, whether a limited remedy failing of its essential purpose defeats a disclaimer of consequential damages.

There are two main schools of thought on the issue. Some courts and commentators conclude that a limited remedy failing of its essential purpose operates to destroy any limitation or exclusion of consequential damages in the same contract. This approach is known as the "dependent" approach, because the enforceability of the consequential damages exclusion depends on the survival of the limitation of remedy.

Our appellate court issued one of the seminal cases for the dependent approach, *Adams v. J.I. Case Co.*, 125 Ill. App. 2d 388 (1970). There, the plaintiff purchased a tractor, pursuant to a purchase agreement which limited his remedy to repair and replacement and also disclaimed consequential damages. The tractor had severe mechanical problems and was in a repair shop for over a year. Plaintiff filed suit, seeking consequential damages for the business he claimed to have lost because defendants were "wilfully dilatory or careless and negligent in making good their warranty." The court concluded:

> "The limitations of remedy and of liability are not separable from the obligations of the warranty. Repudiation of the obligations of the warranty destroys its benefits. The complaint alleges facts that would constitute a repudiation by the defendants of their obligations under the warranty, that repudiation consisting of their wilful failure or their careless and negligent compliance. It should be obvious that they cannot at once repudiate their obligation under their warranty and assert its provisions beneficial to them." *Adams*, 125 Ill. App. 2d at 402-03.

In defense of the dependent approach, the United States District Court for the Northern District of Illinois has reasoned:

> "[P]laintiff also was entitled to assume that defendants would not be unreasonable or wilfully dilatory in making good their warranty in the event of defects in the machinery and equipment. It is the specific breach of the warranty to repair that plaintiff alleges caused the bulk of its damages. This Court would be in an untenable position if it allowed the defendant to shelter itself behind one segment of the warranty when it has allegedly repudiated and ignored its very limited obligations under another segment of the same warranty, which alleged repudiation has caused the very need for relief which the defendant is attempting to avoid." *Jones & McKnight Corp. v. Birdsboro Corp.*, 320 F. Supp. 39, 43-44 (N.D. Ill. 1970) (applying Illinois law).

See also, e.g., *Givan v. Mack Truck, Inc.*, 569 S.W.2d 243, 247 n.7 (Mo. App. 1978) (and cases cited therein); *Pierce v. Catalina Yachts*, 2 P.3d 618, 622 n.14 (Alaska 2000) (collecting cases).

Plaintiff suggests that the dependent approach is followed by a majority of jurisdictions to consider the issue. While this may have been true 15 to 20 years ago[2] (see D. Goetz, *Special Project: Article Two Warranties in Commercial Transactions: An Update,* 72 Cornell L. Rev. 1159, 1307 (1987) ("A majority of cases have answered correctly that the failure of an exclusive remedy voids the consequential damages exclusion clause")), it is no longer the case. Rather, the majority of jurisdictions now follow the other of the two main approaches, the "independent" approach. 1 E. Farnsworth,

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[2] We note that all of the law review articles and all but one of the non-Illinois court decisions plaintiff cites were decided in 1990 or before. The sole post-1990 foreign authority plaintiff cites, *Bishop Logging Co. v. John Deere Industrial Equipment Co.*, 317 S.C. 520, 455 S.E.2d 183 (1995), did not follow the dependent approach, but rather the "case-by-case" approach. *Bishop Logging*, 317 S.C. at 533-37, 455 S.E.2d at 191-93.

Farnsworth on Contracts §4.28(a), at 605-06 (3d ed. 2004) ("some courts have gone so far as to hold that if UCC 2-719(2) applies, related limitations on remedies should all fall like a house of cards, so that a provision barring recovery of consequential damages would also be invalidated. However, most courts have rejected this view"); *Pierce*, 2 P.3d at 622 ("the majority of jurisdictions view these subsections to be independent") (collecting cases). This school of thought holds that a limitation of consequential damages must be judged on its own merits and enforced unless unconscionable, regardless of whether the contract also contains a limitation of remedy which has failed of its essential purpose.

A representative case adopting the independent approach is *Chatlos Systems v. National Cash Register Corp.*, 635 F.2d 1081 (3d Cir. 1980) (applying New Jersey law). There, the court rejected the dependent approach, holding:

> "[T]he better reasoned approach is to treat the consequential damage disclaimer as an independent provision, valid unless unconscionable. This poses no logical difficulties. A contract may well contain no limitation on breach of warranty damages but specifically exclude consequential damages. Conversely, it is quite conceivable that some limitation might be placed on a breach of warranty award, but consequential damages would expressly be permitted.
>
> The limited remedy of repair and a consequential damages exclusion are two discrete ways of attempting to limit recovery for breach of warranty. [Citations.] The [UCC], moreover, tests each by a different standard. The former survives unless it fails of its essential purpose, while the latter is valid unless it is unconscionable. We therefore see no reason to hold, as a general proposition, that the failure of the limited remedy provided in the contract, without more, invalidates a wholly distinct term in the agreement excluding consequential damages.

> The two are not mutually exclusive." *Chatlos Systems*, 635 F.2d at 1086.

See also *Pierce*, 2 P.3d at 622-23 (adopting independent approach), 622 n.16 (collecting cases).

A third approach, "applied relatively infrequently," is the "case by case" approach. D. Hagen, Note, *Sections 2-719(2) & 2-719(3) of the Uniform Commercial Code: The Limited Warranty Package & Consequential Damages*, 31 Val. U.L. Rev. 111, 131 (1996). Under this approach, "[a]n analysis to determine whether consequential damages are warranted must carefully examine the individual factual situation including the type of goods involved, the parties and the precise nature and purpose of the contract." *AES Technology Systems, Inc. v. Coherent Radiation*, 583 F.2d 933, 941 (7th Cir. 1978).

Neither of the parties to this appeal argues in favor of the case-by-case approach, which has been criticized as "not supported by the [UCC] or its official comments." 31 Val. U.L. Rev. at 132. The authorities espousing it have sometimes confused it with the "independent" approach (see, e.g., *Smith v. Navistar International Transportation Corp.*, 957 F.2d 1439, 1443-44 (7th Cir. 1992) (erroneously stating that *Chatlos Systems* had adopted the case-bycase approach). Moreover, although one of the factors cited in favor of the case-by-case approach is that it "allows some measure of certainty" *(Smith,* 957 F.2d at 1444), it has been observed that it in fact "provides *less* predictability than the dependent or independent approaches." (Emphasis added.) 31 Val. U. L. Rev. at 131.

Additionally, notwithstanding that the case-by-case approach might appear to tread a middle ground between the dependent approach (which is generally more favorable for buyers) and the independent approach (which is generally more favorable for sellers), this is not necessarily so. In *AES Technology*, where the case-by-case approach originated, the

contract at issue contained no disclaimer or limitation of consequential damages, only a limitation of remedy. The court affirmed the trial court's conclusion that the limited remedy had failed of its essential purpose. *AES Technology*, 583 F.2d at 940. However, the court inferred a consequential damage disclaimer from the limitation of remedy *(AES Technology*, 583 F.2d at 941 n.9) and proceeded to enforce that inferred disclaimer against the buyer even though the limited remedy had failed of its essential purpose, because "the express provisions of the contract and the factual background" indicated that the parties intended for the buyer to "bear the risk of the project" *(AES Technology,* 583 F.2d at 941). The court inferred a consequential damages disclaimer where none existed, struck the language from which the disclaimer was inferred, then enforced the disclaimer against the buyer anyway, based on the court's understanding of "the factual background." This result could not have been reached under either the dependent or independent approach, and we find the analysis difficult to reconcile with the UCC itself.

We find the case-by-case approach injects uncertainty into the UCC, an area of the law in which uniformity and certainty are highly valued. See 810 ILCS 5/1-102(2)(c) (West 2000); *Connick v. Suzuki Motor Co.*, 174 Ill. 2d 482, 491 (1996). It leads to results which are difficult to reconcile with the provisions of the UCC, and has been criticized as having no basis in the UCC or its comments. 31 Val. U.L. Rev. at 132. We decline to adopt it.

Rather, we agree with the reasoning in *Chatlos Systems*, and adopt the independent approach. The independent approach is more in line with the UCC and with contract law in general. Nothing in the text or the official comments to section 2-719 indicates that where a contract contains both a limitation of remedy and an exclusion of consequential damages, the latter shares the fate of the former. See J. Eddy, *On the "Essential "Purposes of Limited Remedies: The Meta-*

physics of UCC 2-719(2), 65 Cal. L. Rev. 28, 92 (1977) (failure of essential purpose is separate and independent from validity of consequential damage disclaimer); E. Eissenstat, Note, *Commercial Transactions: UCC §2-719: Remedy Limitations and Consequential Damage Exclusions,* 36 Okla L. Rev. 669, 677 (1983) ("a consequential damages disclaimer should be governed by its own [UCC] standard of unconscionability, independent of whether a limited remedy has failed"). To the contrary, as noted in *Chatlos Systems,* the different standards for evaluating the 'two provisions—"failure of essential purpose" versus "unconscionability"—strongly suggest their independence. See also 1 White and Summers' Uniform Commercial Code § 12-10(c), at 668 (4th ed. 1995) (endorsing the independent approach as most in accord with considerations of freedom of contract).

When a contract contains a limitation of remedy but that remedy fails of its essential purpose, it is as if that limitation of remedy does not exist for purposes of the damages to which a plaintiff is entitled for breach of warranty. See 810 ILCS 5/2-719(2) (West 2000) ("remedy may be had as provided in this Act"). When a contract contains a consequential damages exclusion but no limitation of remedy, it is incontrovertible that the exclusion is to be enforced unless unconscionable. 810 ILCS 5/2-719(3) (West 2000). Why, then, would a limitation of remedy failing of its essential purpose destroy a consequential damages exclusion in the same contract? We see no valid reason to so hold.

Indeed, the dependent approach operates to nullify all consequential damage exclusions in contracts which also contain limitations of remedy. For if the limited remedy fails of its essential purpose, the consequential damages exclusion would also automatically fall-regardless of whether it is unconscionable-and if the limitation of remedy does not fail of its essential purpose, the buyer would not be entitled to consequential damages in any event, he would be entitled only to the specified limited remedy.

The two provisions-limitation of remedy and exclusion of consequential damages—can be visualized as two concentric layers of protection for a seller. What a seller would most prefer, if something goes wrong with a product, is simply to repair or replace it, nothing more. This "repair or replacement" remedy is an outer wall, a first defense. If that wall is breached, because the limited remedy has failed of its essential purpose, the seller still would prefer at least not to be liable for potentially unlimited consequential damages, and so he builds a second inner rampart as a fallback position. That inner wall is higher, and more difficult to scale-it falls only if unconscionable.

The independent approach has not been immune to criticism, of course. The Eighth Circuit has rejected the independent approach under Minnesota law, based on the concern that "a buyer when entering into a contract does not anticipate that the sole remedy available will be rendered a nullity, thus causing additional damages." *Soo Line R.R. Co. v. Fruehauf Corp.*, 547 F.2d 1365, 1373 (8th Cif. 1977) (applying Minnesota law). Additionally, one commentator has chastised the independent approach for "rel[ying] on imprecise assumptions about the parties' intent and an unpersuasive interpretation of section 2-719." K. Murtagh, Note, *UCC Section 2-719: Limited Remedies and Consequential Damage Exclusions, 74* Cornell L. Rev. 359, 362 (1989) (concluding that independent approach is "inherently weak"). This article suggests that by engaging in "literal construction of the parties' contract," the independent approach "encourages overly formalistic drafting," which "unfairly favors the party who can afford sophisticated bargaining techniques to ensure the use of his contract terms." 74 Cornell L. Rev. at 363. The article also contends that it is erroneous to conclude that the parties intend to shift the risk of consequential loss to the buyer, because "[t]he language structure itself does not indicate that the parties even considered the possibility of the ineffective limited remedy." 74 Cornell L. Rev. at 364.

Adams and *Jones & McKnight,* two of the earliest cases adopting the dependent approach, implicitly concluded that the independent approach was simply unfair to the buyer. See *Adams,* 125 Ill. App. 2d at 402-03; *Jones & McKnight,* 320 F. Supp. at 43-44.

We recognize these objections to the independent approach, but do not find them compelling. The reasoning in *Adams* and *Jones & McKnight,* for example, is based on the seller's failure to perform being willful. This incorporates considerations ofbad faith on the part of the seller. As we discuss below, the seller's bad faith is a possible basis for finding enforcement of a limitation of consequential damages to be unconscionable. However, the dependent approach strips away limitations of consequential damages whenever a limited remedy fails of its essential purpose, without regard to the good or bad faith of the seller, which we believe goes too far.

The objections to the independent approach in *Soo Line* and the law review article noted above are similarly unpersuasive. Both argue that the independent approach is unfair because the buyer may not intend to renounce consequential damages when the limited remedy has failed of its essential purpose. *Soo Line,* 547 F.2d at 1373; 74 Cornell L. Rev. at 364. But this seems to ignore the plain language of the contract in a fundamental way-for if the buyer does not intend to renounce consequential damages when the limited remedy has failed, in what context *could* the disclaimer of consequential damages operate? As noted above, we believe this is a fundamental defect in the dependent approach, that it renders the disclaimer of consequential damages an utter nullity. If a limited remedy has *not* failed of its essential purpose, that is of course the buyer's only remedy, by definition-this is what it means to have a limited remedy. So in this circumstance a disclaimer of limited damages would be of no effect because it would be redundant. If, as the above

critics argue, the disclaimer of limited damages ought not to be enforced when the limited remedy *has* failed of its essential purpose, the language would never have any effect. Moreover, to the extent that the independent approach encourages parties to pay attention in the drafting process (see 74 Cornell L. Rev. at 363), we see this as a point in favor of the independent approach, rather than the contrary.

Plaintiff objects that Illinois has always followed the dependent approach, and for this court now to endorse the independent approach would unnecessarily reverse "thirty-five (35) years of commercial law in the State of Illinois law that has repeatedly embraced the 'dependent' approach." We disagree with the premise of this argument. It is true *that Adams* endorsed the dependent approach over 35 years ago. See *Adams*, 125 Ill. App. 2d at 402-03. But intervening case law from our appellate court has not consistently followed the dependent approach. More recently, for instance, our appellate court stated:

"In remedy limitation cases, the court must make three inquiries:

> '(1) whether the contract limited the remedy to repair or replacement; (2) whether, if the remedy were so limited, it failed of its essential purpose; and (3) whether, *if the limited remedy failed of its essential purpose,* consequential damages may be recovered because their exclusion is *unconscionable.*'" (Emphases added.) *Intrastate Piping & Controls, Inc. v. Robert James Sales, Inc.,* 315 Ill. App. 3d 248, 256 (2000), quoting *Myrtle Beach Pipeline Corp. v. Emerson Electric Co.,* 843 F. Supp. 1027, 1041 (D.S.C. 1993).

Regardless of whether this language is *dictum,* as plaintiff argues, it is a clear endorsement of the independent approach. Other case law has evinced a confusion as to whether the independent or dependent approach is to be followed. Com-

pare *Lara v. Hyundai Motor America*, 331 Ill. App. 3d 53, 61 (2002) (quoting the above "three inquiries" language from *Intrastate Piping),* with *Lara,* 331 Ill. App. 3d at 63 (holding that "[i]f * * * the limited remedy of replacement or repair of defective parts failed of its essential purpose, the express warranty's exclusion of consequential and incidental damages will have no effect and those damages will be available to plaintiff pursuant to the UCC"). We note also that in that portion of its opinion which endorsed the dependent approach, the *Lara* court-like Adams-cited section 2-719(2) of the UCC but failed to acknowledge section 2-719(3). See *Lara,* 331 Ill. App. 3d at 63; *Adams,* 125 Ill. App. 2d at 403. Illinois decisions dealing with the independent/dependent issue under the UCC have not been consistent. We believe that it is appropriate and necessary that we decide this question.

Moreover, we disagree with the reasoning, although not necessarily the result, in *Adams.* There, in refusing to enforce the consequential damages limitation, our appellate court focused on the allegedly tortious nature of defendants' conduct which caused the limited remedy to fail of its essential purpose. The court concluded that defendants were entitled to none ofthe protections included in the contract because they had "repudiat[ed] * * * their obligations under the warranty." This implies that the sellers' alleged bad faith in repudiating their obligations under the warranty played a part in the analysis-but the dependent approach does not take the seller's good or bad faith into account. Under the dependent approach, the seller is stripped of the protection of a consequential damages disclaimer once a limited remedy has failed of its essential purpose, *regardless* of the seller's good or bad faith.

A seller's deliberate or negligent failure to supply a limited remedy can be taken into consideration in determining whether enforcement of a consequential damages waiver is

unconscionable. The unconscionability determination is not restricted to the facts and circumstances in existence at the time the contract was entered into. *Pierce*, 2 P.3d at 623, quoting *Chatlos Systems*, 635 F.2d at 1087 ("in addition to inquiring into the circumstances at the time of the sale, courts examine the case 'from the perspective of later events' "). Indeed, section 2-719(3) itself expressly provides that matters which become known only subsequent to the drafting of the contract—*i.e.*, the type of injuries suffered as a result of breach-are relevant to the unconscionability calculus. 810 ILLS 5/2-719(3) (West 2000) ("Limitation of consequential damages for injury to the person in the case of consumer goods is prima facie unconscionable but limitation of damages where the loss is commercial is not"); see also 810 ILCS 5/2-719, Uniform Commercial Code Comment 3, at 488 (Smith-Hurd 1993) ("clauses limiting or excluding consequential damages * * * may not *operate* in an unconscionable manner" (emphasis added)). As many of the authorities favoring the dependent approach have noted, there is rarely any basis for concluding that when the parties entered into their contract, the buyer intended to assume the risk ofthe seller's willful or negligent default on his only obligation for breach of warranty.[3] It may well be that in a case such as *Adams*, where the defendant is alleged to have acted in bad faith, the correct result would be to declare a consequential damages exclusion unenforceable. See *McNally Wellman Co. v. New York State Electric & Gas Corp.*, 63 F.3d 1188, 1198 n.9 (2d Cir. 1995) (noting that "section 1-203 of the UCC, which states that '[e]very contract or duty within this Act imposes an obligation of good faith in its performance or enforcement,'" supports the conclusion that bad faith could vitiate a section 2-719(3) consequential

---

[3] However, as we previously observed, we do not find this to be a compelling argument for the dependent approach itself, which strikes consequential damage limitations regardless of the seller's good faith.

damages exclusion). Accordingly, we believe that a plaintiff must be allowed to point to a defendant's conduct, or any other circumstance which he believes would make enforcement of a consequential damages exclusion unconscionable. But the plain language of the UCC indicates that this step, of evaluating whether the exclusion is unconscionable, must be taken before a contractual consequential damages exclusion may be done away with. See 810 ILCS 5/2-719(3) (West 2000).

We conclude that the independent approach is the better-reasoned and more in accordance with the plain language of the UCC. This conclusion is buttressed by the fact that a majority of jurisdictions to consider the issue have adopted the independent approach. Illinois generally follows the majority interpretation of UCC provisions, in order to serve the underlying UCC policy of "'mak[ing] uniform the law among the various jurisdictions.'" *Connick v. Suzuki Motor Co.*, 174 Ill. 2d 482, 491 (1996), quoting 810 ILCS 5/1-102(2)(c) (West 1994). Contractual limitations or exclusions of consequential damages will be upheld unless to do so would be unconscionable, regardless of whether the contract also contains a limited remedy which fails of its essential purpose.

B. *Unconscionability*

Accordingly, the mere fact that the jury found the limited remedy to have failed of its essential purpose does not destroy the provision in the warranty excluding consequential damages. However, this does not mean that the exclusion of consequential damages will necessarily be upheld. Rather, that provision must be judged on its own merits to determine whether its enforcement would be unconscionable. 810 ILCS 5/2-719(3) (West 2000).

A determination of whether a contractual clause is unconscionable is a matter of law, to be decided by the court. 810

ILCS 5/2-302(1) (West 2000); *Frank's Maintenance & Engineering, Inc. v. C.A. Roberts Co.*, *86* Ill. App. 3d 980, 989 (1980). Unconscionability can be either "procedural" or "substantive" or a combination of both. *Frank's Maintenance*, 86 Ill. App. 3d at 989. But see *Rosen v. SCIL, LLC.*, 343 Ill. App. 3d 1075, 1081 (2003) (for a term to be found unconscionable, it must be both procedurally and substantively unconscionable); 1 Farnsworth, Farnsworth on Contracts §4.28, at 585 (3d ed. 2004) ("Most cases of unconscionability involve a combination of procedural and substantive unconscionability," although contracts may be voidable without substantive unconscionability if the procedural unconscionability is sufficiently severe). Procedural unconscionability refers to a situation where a term is so difficult to find, read, or understand that the plaintiff cannot fairly be said to have been aware he was agreeing to it, and also takes into account a lack of bargaining power. *Frank's Maintenance*, 86 Ill. App. 3d at 989. Substantive unconscionability refers to those terms which are inordinately one-sided in one party's favor. *Rosen*, 343 Ill. App. 3d at 1081.

Hyundai argues that plaintiff introduced no evidence to support the trial court's determination that the consequential damages exclusion was unconscionable. We disagree. There are a number of facts immediately apparent from the record which tend to support a finding of unconscionability. This was a contract on a preprinted form, which plaintiff had no hand in drafting. The parties to the contract-a merchant and a consumer-had enormously disparate bargaining power. Moreover, the clause in question is intended to limit the drafter's liability. None of these facts are alone dispositive, but each one is a factor which leads this court to disfavor the clause. See *Pierce*, 2 P.3d at 623 ("Courts are more likely to find unconscionability when a consumer is involved, when there is a disparity in bargaining power, and when the consequential damages clause is on a pre-printed form"); *Frank's Maintenance*, 86 Ill. App. 3d at 992 (although UCC permits

clauses limiting remedies, such clauses are disfavored and must be strictly construed). However, we need not—and we do not—hold that these general circumstances alone or in combination render the clause unconscionable.

There is an additional fact particular to this case which tips the balance in plaintiffs favor. That is the lack of evidence that the disclaimer of consequential damages was present within the written contract itself. Neither party argues that the limited warranty and the disclaimer of consequential damages contained therein were not actually part of the parties' agreement. Rather, both parties proceed from the assumption that the disclaimer is *a potentially* enforceable contractual term, only differing over whether it *should* be enforced in this case. Accordingly, we will assume for purposes of analysis that the disclaimer is part of the parties' contract. However, the fact remains that the portion of the written contract which was admitted into evidence makes no reference to these terms, and neither party now objects to the circuit court's ruling admitting the contract into evidence. Although the contract does mention provisions on the back of the page, the back of the page does not appear in the record before us. Moreover, plaintiff testified without contradiction that she never saw any part of the written warranty, much less the disclaimer of consequential damages, until she looked in her owner's manual after she had signed the contract and driven the car off the lot.

As previously noted, procedural unconscionability refers to a situation where a term is so difficult to find, read, or understand that the plaintiff cannot fairly be said to have been aware he was agreeing to it. Surely, whatever other context there might be in which a contractual provision would be found to be procedurally unconscionable, that label must apply to a situation such as the case at bar where plaintiff has testified that she never saw the clause and defendants produced no evidence that the clause is present or even

referred to in the written contract which plaintiff signed. "[A] limitation of liability given to the buyer after he makes the contract is ineffective." *Frank's Maintenance*, 86 Ill. App. 3d at 991 n.2. Moreover, if there were any question regarding pure procedural unconscionability, we reiterate that unconscionability can be a combination of circumstances substantive and procedural. *Frank's Maintenance*, 86 Ill. App. 3d at *989.* In this case the circumstances are: there is no evidence that the consumer plaintiff saw or could have seen a clause disclaiming a seller's liability, in a form contract drafted by the seller, a merchant with superior bargaining power.

To enforce the clause in these circumstances, we conclude, would indeed be unconscionable. Accordingly, we affirm the circuit court's order to that effect, as well as the $3,500 which represents that portion of the jury verdict intended to recompense plaintiff for the consequential damages she incurred.

H. Warranty Damages

The next issue concerns the jury's $5,000 warranty damage award for the decreased value of the car due to the no-start condition. Hyundai does not object to the jury's conclusion that the vehicle was defective or that the limited remedy failed of its essential purpose. Rather, Hyundai contends merely that there was no evidence to support the jury's damages award, and argues that because the award can only have represented a guess by the jury, the court should have entered judgment notwithstanding the verdict (n.o.v.) in Hyundai's favor. Plaintiff responds that she is not required to prove damages with mathematical precision, and argues that there was sufficient evidence on damages for the case to go to the jury.

As the appellate court noted, the standard for entry of judgment *n.o.v.* is a high one:

> "A court may enter a judgment *n.o.v.* only when, viewing the evidence in a light most favorable to the non-

> moving party, it so overwhelmingly favors the movant that a contrary verdict could not stand. [Citation.] A defendant's motion for judgment *n.o.v.* presents "'a question of law as to whether, when all of the evidence is considered, together with all reasonable inferences from it in its aspect most favorable to the plaintiffs, there is a total failure or lack of evidence to prove any necessary element of the plaintiff's] case.'" [Citation.]" 349 Ill. App. 3d at 658.

Because the limited remedy failed of its essential purpose, plaintiff was entitled to pursue the other remedies afforded by the UCC. 810 ILCS 5/2-719(2) (West 2000). Under the UCC, "The measure of damages for breach of warranty is the difference at the time and place of acceptance between the value of the goods accepted and the value they would have had if they had been as warranted, unless special circumstances show proximate damages of a different amount." 810 ILCS 5/2-714(2) (West 2000). "While it is not necessary that damages for breach of warranty be calculated with mathematical precision [citation], basic contract theory requires that damages be proved with reasonable certainty and precludes damages based on conjecture or speculation [citation]." *Ouwenga v. Nu-Way Ag, Inc.*, 239 Ill. App. 3d 518, 523 (1992). Accord *Mitsch v. General Motors Corp.*, 359 Ill. App. 3d 99, 104 (2005); *Valenti v. Mitsubishi Motor Sales of America, Inc.*, 332 Ill. App. 3d 969, 973 (2002). See also *Midland Hotel Corp. v. Reuben H. Donnelley Corp.*, 118 Ill. 2d 306, 315-16 (1987) ("In order to recover lost profits, it is not necessary that the amount of loss be proven with absolute certainty. *** However, recovery of lost profits cannot be based upon conjecture or sheer speculation. [Citation.] It is necessary that the evidence afford a reasonable basis for the computation of damages").

In this case there was no sufficient basis for the jury's $5,000 award. There was no documentary evidence submitted

on the damages question, nor expert testimony. The only possible evidence of how much the vehicle's value decreased is plaintiff's testimony, and plaintiff's only testimony which touches on the subject was that she would not today pay the price she had originally paid for the vehicle, because "given the problems that this vehicle-that I have had with this vehicle or the problems the vehicle has had, that's like a used car. I would not pay that for a new car with used problems as it were." There is simply no way for the jury to get from this testimony to a $5,000 award without engaging in speculation and conjecture. "'[I]n proving damages, the burden is on the plaintiff to establish a reasonable basis for computing damages.'" *Snelson v. Kamm*, 204 Ill. 2d 1, 33 (2003), quoting *Gill v. Foster*, 157 Ill. 2d 304, 313 (1993). In this case, plaintiff failed to do so.

Plaintiff notes that the price of the car was also entered into evidence and suggests that jurors have sufficient familiarity with cars and breakdowns that they ought to be permitted to determine for themselves how much a car's value would be diminished by events of the type which occurred in this case. Plaintiff cites a number of cases which suggest that damages may be proven in any manner which is "reasonable," and also notes that our appellate court has held that "[w]here the right of recovery exists the defendant cannot escape liability because the damages are difficult to prove." *Burrus v. Itek Corp.*, 46 Ill. App. 3d 350, 357 (1977).

We agree that damages may be proven in any reasonable manner, as a general proposition of law (see, *e.g.*, *Snelson*, 204 Ill. 2d at 33) but this begs the question whether damages were proven in a reasonable manner in this case. The answer is clearly no. Although jurors are not required to check their common sense at the courtroom door (see *People v. Steidl*, 142 Ill. 2d 204, 238 (1991)), we are not prepared to endorse the proposition that jurors are as a class sufficiently familiar with automobiles as to be able to determine the degree of

diminution of a particular vehicle's value based on a particular defect without the need for any evidence at all. This is more than a matter of simple common sense. Plaintiff testified, in essence, that "It wasn't worth what I paid for it." There was no number presented, nothing for the jury to work from.

Plaintiff argues that the Magnuson-Moss Act and the UCC are to be construed liberally, and argues that when a plaintiff proves he has suffered damages, the defendant ought not to escape liability simply because the precise measure of the damages is difficult to ascertain. See *Burrus v. Itek Corp.*, 46 Ill. App. 3d 350, 357 (1977). We again agree with these propositions as a general matter. But regardless, even assuming that plaintiff suffered some damage, there must be some basis for a jury's damage award, and we can see no process other than speculation by which the jury could have translated the evidence presented by plaintiff to an award of $5,000. We note that even in *Burrus*, itself a UCC case in which a dissatisfied buyer was attempting to recover for the value of defective goods, the record included "testimony" as to "the actual value of the defective [goods] at time of acceptance." *Burrus*, 46 Ill. App. 3d at 357. In this case, by contrast, there is nothing, truly not a scintilla of evidence to support any particular verdict at which the jury might have arrived-much less the suspiciously round number of $5,000.

However, we feel compelled to note that plaintiff attempted to introduce such evidence. During plaintiff's case in chief, the circuit court precluded plaintiff's counsel's from asking plaintiff how much she would have paid for the car if she had known of the defects. This was error, and it was only because of this error that plaintiff failed to prove damages. Although the decision whether a witness is competent to testify is a matter within the trial court's discretion, lay witnesses are permitted to give their opinion as to the value of property if they have sufficient personal knowledge of the

property and its value. *State Farm General Insurance Co. v. Best in the West Foods, Inc.*, 282 Ill. App. 3d 470, 483 (1996). It is true that there must be an adequate showing of the basis for such testimony before it will be allowed *(Best in the West Foods*, 282 Ill. App. 3d at 483), but in this case, the circuit court sustained defense counsel's objection while plaintiffs counsel was attempting to establish the foundation of plaintiff's knowledge as to the value of the vehicle. This was clearly erroneous.

Accordingly, although plaintiff's case failed for proof of damages, it would be entirely unjust to reverse the verdict outright. As previously noted, "[w]here the right of recovery exists the defendant cannot escape liability because the damages are difficult to prove." *Burrus,* 46 Ill. App. 3d at 357 (1977). Accord *McGrady v. Chrysler Motors Corp.,* 46 Ill. App. 3d 136, 140 (1977). Therefore, pursuant to our authority under Supreme Court Rule 366(a)(5) (155 Ill. 2d R. 366(a)(5)), we reverse and remand for a new trial solely on the question of the warranty damages to which plaintiff is entitled. See *Ford Motor Co. v. Cooper,* 125 S.W.3d 794, 804 (Tex. Civ. App. 2004) (noting that "appellate courts have reversed for a new trial where, among other circumstances, the plaintiff failed to show damages with reasonable certainty, but the interests of justice required the plaintiff be given an opportunity to show the proper measure of his or her damages," and remanding for new trial, where jury awarded plaintiff $5,000 for breach of automobile warranty without sufficient evidence of value as delivered).

At this new trial, plaintiff's counsel must not be precluded from attempting to lay a foundation for plaintiff's knowledge of the value of the car. However, of course, the evaluation of the sufficiency of whatever foundation may be laid to establish plaintiff's personal knowledge of the value of the car will be within the circuit court's discretion (*Best in the West Foods*, 282 Ill. App. 3d at 483); we are not prejudging this question in favor of either party.

III. Attorney fees

Hyundai admits that the Magnuson-Moss Act permits the court to award attorney fees to a victorious plaintiff. See 15 U.S.C. §2310(d)(2) (2000). Hyundai's only argument here is that once we have reversed the entire verdict in plaintiff's favor, plaintiff cannot be considered "victorious," and accordingly we must also reverse the fee award. Hyundai does not argue nor even suggest that a partial reversal requires that we remand the cause to the circuit court to recalculate the fees to which plaintiff's counsel would be entitled. However, we have not reversed the entire verdict in plaintiff's favor. Accordingly, this argument fails.

CONCLUSION

For the reasons given above, the judgment of the appellate court is affirmed in part and reversed in part, and the judgment of the circuit court is also affirmed in part and reversed in part. We remand for a new trial on the issue of warranty damages.

Appellate court judgment affirmed in part
and reversed in part;
circuit court judgment affirmed in part
and reversed in part;
cause remanded.

APPENDIX C

[LOGO]

SUPREME COURT OF ILLINOIS
SUPREME COURT BUILDING
SPRINGFIELD 62701

June 29, 2006

JULEANN HORNYAK
CLERK OF THE COURT
(217) 782-2035

TELECOMMUNICATIONS DEVICE
FOR THE DEAF
(217) 524-8132

FIRST DISTRICT OFFICE
20TH FLOOR
160 N. LASALLE ST.
CHICAGO 60601
(312) 793-1332

TELECOMMUNICATIONS DEVICE
FOR THE DEAF
(312) 793-6185

Ms. Denean K. Sturino
FagelHaber LLC
55 East Monroe Street, 40th Floor
Chicago, IL 60602

No. 98813—Shante Razor, appellee, v. Hyundai Motor America, appellant. Appeal, Appellate Court, First District.

The Supreme Court today DENIED the petition for rehearing in the above entitled cause.

The mandate of this Court will issue to the appropriate Appellate Court and/or Circuit Court or other agency on August 3, 2006.

Opinion modified on denial of rehearing.

McMorrow, J., dissented from the denial of rehearing, with opinion.

Karmeier, J., dissented from the denial of rehearing, without opinion.

IN THE SUPREME COURT OF
THE STATE OF ILLINOIS

Docket No. 98813.

SHANTE RAZOR,

Appellee,

v.

HYUNDAI MOTOR AMERICA,

Appellant.

Opinion filed February 2, 2006. Modified upon denial of rehearing June 29, 2006.

JUSTICE FREEMAN delivered the judgment of the court, with opinion.

Chief Justice Thomas and Justices Fitzgerald, Kilbride, and Garman concurred in the judgment and opinion.

Justice McMorrow dissented from the denial of rehearing, with opinion.

Justice Karmeier dissented from the denial of rehearing, without opinion.

OPINION

This appeal involves the federal Magnuson-Moss Warranty-Federal Trade Commission Improvement Act (Act) (15 U.S.C. §2301 *et seq.* (2000)) and the Illinois Uniform Commercial Code (UCC) (810 ILCS 5/1-101 *et seq.* (West 2000)). The only issues raised concern the propriety of the damages awarded to the plaintiff. The primary question is whether the circuit court acted properly in refusing to enforce a contractual clause prohibiting the award of consequential

damages. There is also a sufficiency of the evidence challenge to the court's award of warranty damages. We affirm in part, reverse in part, and remand.

BACKGROUND

Plaintiff Shante Razor purchased a new Hyundai Sonata from Gartner Buick, Inc. (Gartner), on August 4, 2001. At the time she purchased the car, plaintiff also bought an optional remote starter and alarm system from an "options" booklet shown to her by the Gartner salesman. Gartner subcontracted the installation of this starter to Professional Sound Installers (ProSound). ProSound did not install it on the date plaintiff purchased her vehicle, but a few weeks later, on August 30, 2001.

The Sonata was the first new car plaintiff had ever purchased. It came with a five-year, 60,000-mile warranty, a copy of which was introduced into evidence. In pertinent part, the warranty provided as follows:

> "WHAT IS COVERED
>
> Repair or replacement of any component originally manufactured or installed by Hyundai Motor Company or Hyundai Motor America (HMA) that is found to be defective in material or workmanship under normal use and maintenance, except any item specifically referred to in the section 'What is Not Covered.'
>
> * * *
>
> WHAT IS NOT COVERED
>
> * Damage or failure resulting from:
>
> —Negligence of proper maintenance as required in the Owner's Manual.
>
> —Misuse, abuse, accident, theft, water/flooding or fire.

* * *

—Any device and/or accessories not supplied by Hyundai.

* * *

* INCIDENTAL OR CONSEQUENTIAL DAMAGES, INCLUDING WITHOUT LIMITATION, LOSS OF TIME, INCONVENIENCE, LOSS OF USE OF THE VEHICLE, OR COMMERCIAL LOSS.

* The duration of any implied warranties, including those for MERCHANTABILITY and FITNESS FOR A PARTICULAR PURPOSE, are limited to the duration of this limited warranty.

Some states do not allow limitations on how long an implied warranty lasts, or the exclusion or limitation of incidental and consequential damages, so the limitations or exclusions set forth regarding this limited warranty may not apply to you. You may also have other rights which vary from state to state."

In late September 2001, plaintiff began experiencing difficulties with the vehicle. On September 26, plaintiff had the vehicle towed to Gartner for service because it failed to start when she turned the key. She experienced the same problem and again had the vehicle towed to Gartner for service on October 6, October 16, and October 25. On the latter occasion, Gartner kept the vehicle for more than two weeks, providing plaintiff with a rental car to use during the time the vehicle was out of her possession. Nevertheless, the problem happened again on November 21, the day before Thanksgiving, when plaintiff had taken the day off from work to go shopping for the holiday. After a technician came to her home and was himself unable to start the car, the vehicle was yet again towed to Gartner for attempted repairs.

Sometimes after being towed to Gartner the vehicle started normally, other times it did not. Gartner technicians attempted various different repairs on the different occasions that the car appeared before them, including replacing the starter, replacing the "ECU power relay," replacing the remote starter with an updated system, and replacing the "trans range switch" and "starter relay." Additionally, after the October 25 no-start, when the vehicle was kept for more than two weeks, ProSound removed the remote starter it had originally installed on plaintiffs vehicle and replaced it with an updated model. Plaintiff was not charged for any of the attempted repairs.

In December 2001, plaintiff filed suit against defendant, Hyundai Motor America (Hyundai). Plaintiff made claims against Hyundai pursuant to the Magnuson-Moss Warranty Act (15 U.S.C. §2301 *et seq.* (2000)) for breach of written warranty and breach of implied warranty of merchantability. Plaintiff also alleged that Hyundai had violated the Illinois New Vehicle Buyer Protection Act (815 ILCS 380/1 *et seq.* (West 2000)).

The case initially went to arbitration. The arbitration panel found in plaintiff's favor, and entered an award of $6,500, plus attorney fees and costs. Hyundai rejected this award and demanded trial.

The case went to trial in February 2003. Plaintiff was the sole witness for her case, and most of the above undisputed facts are drawn from her testimony. In addition, plaintiff testified that she never saw the actual warranty until after she had purchased the car, because the warranty was contained in the owner's manual, which she saw for the first time in the glove box of her vehicle when she drove it off the lot. Plaintiff's purchase contract, a copy of which was introduced into evidence, does not appear to contain or refer to the vehicle warranty. When asked on cross-examination if she had seen the warranty on a placard at Gartner, plaintiff

testified that she had not. Plaintiff testified that she had performed all required maintenance on her car, had never been in an accident or been the victim of vandalism, and that no one other than Gartner had ever performed any repairs on the vehicle.

During plaintiff's direct examination, defense counsel objected when plaintiff's counsel inquired regarding her purchase of prior automobiles. During a lengthy sidebar, counsel explained that he was attempting to lay a foundation in order to ask her how much the car's value to her had decreased because of the problems she had with it. The court ruled that plaintiff could not answer such a question. The court indicated that plaintiff could testify "as to what her feelings were, what her frame of mind was and the impact of the slow [*sic*] start situation on her personal feelings. * * * But as to 'the value of the vehicle would have been such and such because of the no start conditions,' I don't see how you're going to go that far with it." Plaintiff was permitted to testify that the purchase price of her Sonata was $16,522, and that she would eventually have paid a total of $21,249 for the car, including finance charges.

Plaintiff testified that the vehicle did not provide her the type of transportation she expected. She testified, "[I]t's a brand new car. I expected it to be perfect, flawless or minimal problems, certainly not the ones that I encountered here." She testified that she would not purchase the same vehicle today, because it was "proven unreliable," and she would not today pay the price she had originally paid for the vehicle, because "given the problems that this vehicle—that I have had with this vehicle or the problems the vehicle has had, that's like a used car. I would not pay that for a new car with used problems as it were." Plaintiff also testified that the problems she had with the car had caused her considerable inconvenience, including missing days of work. However, on cross-examination, plaintiff admitted she was still driving the

car at the time of trial—May 2003—and had not experienced any difficulties with it since December 2001.

Plaintiff offered her exhibits into evidence and rested. Hyundai moved for a directed verdict, which the court denied in its entirety. During argument on the motion, the court initially ruled that Hyundai's disclaimer of incidental and consequential damages was not unconscionable, but shortly thereafter the court reversed itself and ruled that the disclaimer was unconscionable and would not be enforced. When defense counsel inquired of the court as to the basis for its ruling that the disclaimer was unconscionable, the court responded:

> "THE COURT: The number of attempts that the plaintiff attempted for repairs. The fact that the plaintiff needed, used or intended to use the vehicle for transportation to and from work. The fact that the plaintiff was unable to use the vehicle for the time period in question for it's [sic] intended use."

After the court denied Hyundai's motion for a directed verdict, the defense called its sole witness, Randy Wood. Wood is treasurer and part owner ofProSound, the company which installed plaintiff s alarm and remote starter system. He testified that ProSound had inspected the system installed on plaintiffs vehicle on more than one occasion, and no problem was ever found. Although ProSound did replace plaintiff's system with the newest model, this was for customer satisfaction purposes only, because ProSound never found anything wrong with plaintiff's system. He did admit on redirect examination that plaintiff's vehicle "may have" had a weak signal coming through its "tack [*sic*] wire," and if that condition existed it could cause problems for the ProSound system. Wood also testified that the system could itself prevent the car from starting, if one attempted to start it with the key after locking the car with the remote control.

After the defense rested, Hyundai renewed its motion for a directed verdict, including specifically arguing that the court should not have reversed its initial conclusion regarding the enforceability of the consequential damages disclaimer. The court denied Hyundai's motions and submitted the case to the jury.

The jury returned a verdict for plaintiff on the breach of warranty claims, awarding her $5,000 in warranty damages for the diminished value of the Sonata due to the defects, and $3,500 in consequential damages for aggravation and inconvenience and loss of use. The jury also answered "yes" to a special interrogatory which asked, "Did plaintiff prove the aftermarket remote starter-alarm system was not the cause of the no-start condition?" The jury found in defendant's favor, however, on plaintiff's claim under the New Vehicle Buyer Protection Act. The court awarded plaintiff $12,277 in attorney fees and costs.

The appellate court affirmed in all respects. 349 Ill. App. 3d 651.

Hyundai petitioned for leave to appeal to this court (see 155 Ill. 2d R. 315(a)), which we granted.

ANALYSIS

Before this court the issues have been pared down. Hyundai neither challenges the jury's conclusions regarding causation nor contends that plaintiff failed to prove that the warranty failed of its essential purpose. Plaintiff does not cross-appeal the jury verdict in Hyundai's favor on her New Vehicle Buyer Protection Act claim. Neither party raises any issues regarding the circuit court's conduct of the trial.

Rather, the arguments now focus exclusively on damages. Hyundai first argues that the circuit court erred in refusing to enforce the contractual exclusion of incidental and consequential damages. Hyundai argues that the mere fact that its

warranty failed of its essential purpose does not invalidate the consequential damages disclaimer, and contends that plaintiff introduced no evidence to support the circuit court's ruling that the disclaimer should not be enforced. Second, Hyundai contends that there was insufficient evidence to support the jury's warranty damage award. Finally, Hyundai argues that if this court reverses both damage awards, we must also reverse the circuit court's award of fees and costs. Plaintiff raises no additional arguments. Thus, these are the only issues before us.

I. Enforceability of Hyundai's Disclaimer of Incidental/Consequential Damages

The main issue before this court is the enforceability of Hyundai's disclaimer of incidental and consequential damages. Hyundai argues that the disclaimer is independent of the limited remedy, and the disclaimer may stand even if its limited remedy failed of its essential purpose. Hyundai contends that the disclaimer may be overridden only if it is itself unconscionable, a standard which Hyundai argues has not been met in the instant case. Plaintiff responds that the disclaimer should fall with the limited warranty, and contends that even if this court finds them to be severable, the disclaimer in this case was unconscionable.

A. *"Independent" vs. "Dependent" Approach to Provisions Limiting Remedy and Excluding Consequential Damages*

As previously noted, plaintiff's claim was brought under the Magnuson-Moss Warranty Act (15 U.S.C. §2301 *et seq.* (1994)). Under the Act, consumers who have been damaged by any warrantor's failure to comply with its obligations under a written warranty may bring suit "in any court of competent jurisdiction in any State or the District of Columbia." 15 U.S.C. §2310(d)(1)(A) (1994).

The Act itself does not determine the enforceability of the consequential damages disclaimer, however. The Act does

supersede state law, but only to the extent that state law is inconsistent with the Act. 15 U.S.C. §2311 (1994); *see Sorce v. Naperville Jeep Eagle*, 309 Ill. App. 3d 313, 323 (1999). The warranty at issue in this case was a limited warranty, and the Act does not set out requirements for limited warranties.[1] Rather, the Act merely prescribes certain requirements with which warranties must comply in order to be called "full" warranties. See 15 U.S.C. §2303(a) (1994) (a warranty which meets the standards set forth in section 4 of the Act (15 U.S.C. §2304 (1994)) "shall be conspicuously designated a `full (statement of duration) warranty,'" and a warranty which does not meet the standards set out in section 4 of the Act "shall be conspicuously designated a `limited warranty' ").

Accordingly, to determine the enforceability of a consequential damages disclaimer in a limited warranty, we look to state law. See *Lora v. Hyundai Motor America*, 331 Ill. App. 3d 53, 62 (2002); Sorce, 309 Ill. App. 3d at 325. In Illinois, the sale of goods is governed by article 2 of the Uniform Commercial Code (UCC). 810 ILCS 5/1-101 *et seq.* (2000). Central to this case is section 2-719 of the UCC, which governs "Contractual modification or limitation of remedy":

> "(1) Subject to the provisions of subsections (2) and (3) of this Section and of the preceding section on liquidation and limitation of damages,
>
> (a) the agreement may provide for remedies in addition to or in substitution for those provided in this Article and may limit or alter the measure of damages

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[1] The Act does permit the Federal Trade Commission to establish general disclosure requirements for the terms and conditions of all warranties, *e.g.*, that they must clearly identify the warrantors, the warrantees, the products or parts covered, etc. *See* 15 U.S.C. §2302 (1994). However, the Act itself does not directly establish any such disclosure requirements, nor do the parties raise any arguments regarding any requirements the FTC may have established.

recoverable under this Article, as by limiting the buyer's remedies to return of the goods and repayment of the price or to repair and replacement of nonconforming goods or parts; and

(b) resort to a remedy as provided is optional unless the remedy is expressly agreed to be exclusive, in which case it is the sole remedy.

(2) Where circumstances cause an exclusive or limited remedy to fail of its essential purpose, remedy may be had as provided in this Act.

(3) Consequential damages may be limited or excluded unless the limitation or exclusion is unconscionable. Limitation of consequential damages for injury to the person in the case of consumer goods is prima facie unconscionable but limitation of damages where the loss is commercial is not." 810 ILCS 5/2-719 (West 2000).

In this case, Hyundai's limited warranty contained both a limitation of remedy and an exclusion of consequential damages. The warranty expressly limited the buyer's remedies to repair and replacement of nonconforming parts, as permitted under section 2-719(1)(a). However, the warranty additionally provided that incidental or consequential damages were "not covered," as permitted under section 2-719(3).

Plaintiff claimed—and the jury found—that the Hyundai limited remedy had failed of its essential purpose because of the persistence of the no-start problem with plaintiff's car. Hyundai does not question this factual determination in this appeal. Thus, according to section 2-719(2) of the UCC, plaintiff was entitled to remedy "as provided in this Act." 810 ILCS 5/2-719(2) (West 2000). See also 810 ILCS Ann. 5/2-719, Uniform Commercial Code Comment 1, at 488 (Smith-Hurd 1993) ("under subsection (2), where an apparently fair and reasonable clause because of circumstances fails in its

purpose or operates to deprive either party of the substantial value of the bargain, it must give way to the general remedy provisions of this Article").

This does not end the inquiry insofar as consequential damages are concerned, however. Subsection (3) of section 2-719 is part of "this Act" —*i.e.*, the UCC—and subsection (3) permits a seller to limit or exclude consequential damages unless to do so would be unconscionable. It still must be determined, therefore, whether a limited remedy failing of its essential purpose defeats a disclaimer of consequential damages.

There are two main schools of thought on the issue. Some courts and commentators conclude that a limited remedy failing of its essential purpose operates to destroy any limitation or exclusion of consequential damages in the same contract. This approach is known as the "dependent" approach, because the enforceability of the consequential damages exclusion depends on the survival of the limitation of remedy.

Our appellate court issued one of the seminal cases for the dependent approach, *Adams v. J.I. Case Co.*, 125 Ill. App. 2d 388 (1970). There, the plaintiff purchased a tractor, pursuant to a purchase agreement which limited his remedy to repair and replacement and also disclaimed consequential damages. The tractor had severe mechanical problems and was in a repair shop for over a year. Plaintiff filed suit, seeking consequential damages for the business he claimed to have lost because defendants were "wilfully dilatory or careless and negligent in making good their warranty." The court concluded:

> "The limitations of remedy and of liability are not separable from the obligations of the warranty. Repudiation of the obligations of the warranty destroys its benefits. The complaint alleges facts that would constitute a repudiation by the defendants of their obligations under the warranty, that repudiation consisting of their wilful fail-

> ure or their careless and negligent compliance. It should be obvious that they cannot at once repudiate their obligation under their warranty and assert its provisions beneficial to them." *Adams*, 125 Ill. App. 2d at 402-03.

In defense of the dependent approach, the United States District Court for the Northern District of Illinois has reasoned:

> "[P]laintiff also was entitled to assume that defendants would not be unreasonable or wilfully dilatory in making good their warranty in the event of defects in the machinery and equipment. It is the specific breach of the warranty to repair that plaintiff alleges caused the bulk of its damages. This Court would be in an untenable position if it allowed the defendant to shelter itself behind one segment of the warranty when it has allegedly repudiated and ignored its very limited obligations under another segment of the same warranty, which alleged repudiation has caused the very need for relief which the defendant is attempting to avoid." Jones & *McKnight Corp. v. Birdsboro Corp.*, 320 F. Supp. 39, 43-44 (N.D. Ill. 1970) (applying Illinois law).

See also, *e.g., Givan v. Mack Truck, Inc.*, 569 S.W.2d 243, 247 n.7 (Mo. App. 1978) (and cases cited therein); *Pierce v. Catalina Yachts*, 2 P.3d 618, 622 n.14 (Alaska 2000) (collecting cases).

Plaintiff suggests that the dependent approach is followed by a majority of jurisdictions to consider the issue. While this may have been true 15 to 20 years ago[2] (see D. Goetz, *Special*

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[2] We note that all of the law review articles and all but one of the non-Illinois court decisions plaintiff cites were decided in 1990 or before. The sole post-1990 foreign authority plaintiff cites, *Bishop Logging Co. v. John Deere Industrial Equipment Co.*, 317 S.C. 520, 455 S.E.2d 183 (1995), did not follow the dependent approach, but rather the "case-by-case" approach. *Bishop Logging*, 317 S.C. at 533-37, 455 S.E.2d at 191-93.

Project: Article Two Warranties in Commercial Transactions: An Update, 72 Cornell L. Rev. 1159, 1307 (1987) ("A majority of cases have answered correctly that the failure of an exclusive remedy voids the consequential damages exclusion clause")), it is no longer the case. Rather, the majority of jurisdictions now follow the other of the two main approaches, the "independent" approach. 1 E. Farnsworth, Farnsworth on Contracts §4.28(a), at 605-06 (3d ed. 2004) ("some courts have gone so far as to hold that if UCC 2-719(2) applies, related limitations on remedies should all fall like a house of cards, so that a provision barring recovery of consequential damages would also be invalidated. However, most courts have rejected this view"); Pierce, 2 P.3d at 622 ("the majority of jurisdictions view these subsections to be independent") (collecting cases). This school of thought holds that a limitation of consequential damages must be judged on its own merits and enforced unless unconscionable, regardless of whether the contract also contains a limitation of remedy which has failed of its essential purpose.

A representative case adopting the independent approach is *Chatlos Systems v. National Cash Register Corp.*, 635 F.2d 1081 (3d Cir. 1980) (applying New Jersey law). There, the court rejected the dependent approach, holding:

> "[T]he better reasoned approach is to treat the consequential damage disclaimer as an independent provision, valid unless unconscionable. This poses no logical difficulties. A contract may well contain no limitation on breach of warranty damages but specifically exclude consequential damages. Conversely, it is quite conceivable that some limitation might be placed on a breach of warranty award, but consequential damages would expressly be permitted.
>
> The limited remedy of repair and a consequential damages exclusion are two discrete ways of attempting to limit recovery for breach of warranty. [Citations.] The

> [UCC], moreover, tests each by a different standard. The former survives unless it fails of its essential purpose, while the latter is valid unless it is unconscionable. We therefore see no reason to hold, as a general proposition, that the failure of the limited remedy provided in the contract, without more, invalidates a wholly distinct term in the agreement excluding consequential damages. The two are not mutually exclusive." *Chatlos Systems*, 63 5 F.2d at 1086.

See also *Pierce*, 2, P.3d at 622-23 (adopting independent approach), 622 n.16 (collecting cases).

A third approach, "applied relatively infrequently," is the "case by case" approach. D. Hagen, Note, *Sections 2-719(2) & 2-719(3) of the Uniform Commercial Code: The Limited Warranty Package & Consequential Damages*, 31 Val. U.L. Rev. 111, 131 (1996). Under this approach, "[a]n analysis to determine whether consequential damages are warranted must carefully examine the individual factual situation including the type of goods involved, the parties and the precise nature and purpose of the contract." *AES Technology Systems, Inc. v. Coherent Radiation*, 583 F.2d 933, 941 (7th Cir. 1978).

Neither of the parties to this appeal argues in favor of the case-bycase approach, which has been criticized as "not supported by the [UCC] or its official comments." 31 Val. U.L. Rev. at 132. The authorities espousing it have sometimes confused it with the "independent" approach (see, *e.g.*, *Smith v. Navistar International Transportation Corp.*, 957 F.2d 1439, 1443-44 (7th Cir. 1992) (erroneously stating that *Chatlos Systems* had adopted the case-by-case approach). Moreover, although one of the factors cited in favor of the case-by-case approach is that it "allows some measure of certainty" (*Smith*, 957 F.2d at 1444), it has been observed that it in fact "provides *less* predictability than the dependent or independent approaches." (Emphasis added.) 31 Val. U. L. Rev. at 131.

Additionally, notwithstanding that the case-by-case approach might appear to tread a middle ground between the dependent approach (which is generally more favorable for buyers) and the independent approach (which is generally more favorable for sellers), this is not necessarily so. In *AES Technology*, where the case-by-case approach originated, the contract at issue contained no disclaimer or limitation of consequential damages, only a limitation of remedy. The court affirmed the trial court's conclusion that the limited remedy had failed of its essential purpose. *AES Technology*, 583 F.2d at 940. However, the court inferred a consequential damage disclaimer from the limitation of remedy (*AES Technology*, 583 F.2d at 941 n.9) and proceeded to enforce that inferred disclaimer against the buyer even though the limited remedy had failed of its essential purpose, because "the express provisions of the contract and the factual background" indicated that the parties intended for the buyer to "bear the risk of the project" (*AES Technology*, 583 F.2d at 941). The court inferred a consequential damages disclaimer where none existed, struck the language from which the disclaimer was inferred, then enforced the disclaimer against the buyer anyway, based on the court's understanding of "the factual background." This result could not have been reached under either the dependent or independent approach, and we find the analysis difficult to reconcile with the UCC itself.

We find the case-by-case approach injects uncertainty into the UCC, an area of the law in which uniformity and certainty are highly valued. See 810 ILCS 5/1-102(2)(c) (West 2000); *Connick v. Suzuki Motor Co.*, 174 Ill. 2d 482, 491 (1996). It leads to results which are difficult to reconcile with the provisions of the UCC, and has been criticized as having no basis in the UCC or its comments. 31 Val. U.L. Rev. at 132. We decline to adopt it.

Rather, we agree with the reasoning in *Chatlos Systems*, and adopt the independent approach. The independent ap-

proach is more in line with the UCC and with contract law in general. Nothing in the text or the official comments to section 2-719 indicates that where a contract contains both a limitation of remedy and an exclusion of consequential damages, the latter shares the fate of the former. See J. Eddy, *On the "Essential" Purposes of Limited Remedies: The Metaphysics of UCC 2-719(2)*, 65 Cal. L. Rev. 28, 92 (1977) (failure of essential purpose is separate and independent from validity of consequential damage disclaimer); E. Eissenstat, Note, *Commercial Transactions: UCC §2-719: Remedy Limitations and Consequential Damage Exclusions*, 36 Okla L. Rev. 669, 677 (1983) ("a consequential damages disclaimer should be governed by its own [UCC] standard of unconscionability, independent of whether a limited remedy has failed"). To the contrary, as noted in *Chatlos Systems*, the different standards for evaluating the two provisions—"failure of essential purpose" versus "unconscionability"—strongly suggest their independence. See also 1 White and Summers' Uniform Commercial Code § 12-10(c), at 668 (4th ed. 1995) (endorsing the independent approach as most in accord with considerations of freedom of contract).

When a contract contains a limitation of remedy but that remedy fails of its essential purpose, it is as if that limitation of remedy does not exist for purposes of the damages to which a plaintiff is entitled for breach of warranty. See 810 ILCS 5/2-719(2) (West 2000) ("remedy may be had as provided in this Act"). When a contract contains a consequential damages exclusion but no limitation of remedy, it is incontrovertible that the exclusion is to be enforced unless unconscionable. 810 ILCS 5/2-719(3) (West 2000). Why, then, would a limitation of remedy failing of its essential purpose destroy a consequential damages exclusion in the same contract? We see no valid reason to so hold.

Indeed, the dependent approach operates to nullify all consequential damage exclusions in contracts which also

contain limitations of remedy. For if the limited remedy fails of its essential purp[illegible] the consequential damages exclusion would also automa[illegible]ly fall—regardless of whether it is unconscionable—and if the limitation of remedy does not fail of its essential purpose, the buyer would not be entitled to consequential damages in any event, he would be entitled only to the specified limited remedy.

The two provisions—limitation of remedy and exclusion of consequential damages—can be visualized as two concentric layers of protection for a seller. What a seller would most prefer, if something goes wrong with a product, is simply to repair or replace it, nothing more. This "repair or replacement" remedy is an outer wall, a first defense. If that wall is breached, because the limited remedy has failed of its essential purpose, the seller still would prefer at least not to be liable for potentially unlimited consequential damages, and so he builds a second inner rampart as a fallback position. That inner wall is higher, and more difficult to scale—it falls only if unconscionable.

The independent approach has not been immune to criticism, of course. The Eighth Circuit has rejected the independent approach under Minnesota law, based on the concern that "a buyer when entering into a contract does not anticipate that the sole remedy available will be rendered a nullity, thus causing additional damages." *Soo Line R.R. Co. v. Fruehauf Corp.*, 547 F.2d 1365, 1373 (8th Cir. 1977) (applying Minnesota law). Additionally, one commentator has chastised the independent approach for "rel[ying] on imprecise assumptions about the parties' intent and an unpersuasive interpretation of section 2-719." K. Murtagh, Note, *UCC Section 2-719: Limited Remedies and Consequential Damage Exclusions*, 74 Cornell L. Rev. 359, 362 (1989) (concluding that independent approach is "inherently weak"). This article suggests that by engaging in "literal construction of the parties' contract," the independent approach "encourages

overly formalistic drafting," which "unfairly favors the party who can afford sophisticated bargaining techniques to ensure the use of his contract terms." 74 Cornell L. Rev. at 363. The article also contends that it is erroneous to conclude that the parties intend to shift the risk of consequential loss to the buyer, because "[t]he language structure itself does not indicate that the parties even considered the possibility of the ineffective limited remedy." 74 Cornell L. Rev. at 364. *Adams* and *Jones & McKnight*, two of the earliest cases adopting the dependent approach, implicitly concluded that the independent approach was simply unfair to the buyer. See *Adams*, 125 Ill. App. 2d at 402-03; *Jones & McKnight*, 320 F. Supp. at 43-44.

We recognize these objections to the independent approach, but do not find them compelling. The reasoning in *Adams* and *Jones & McKnight*, for example, is based on the seller's failure to perform being willful. This incorporates considerations of bad faith on the part of the seller. As we discuss below, the seller's bad faith is a possible basis for finding enforcement of a limitation of consequential damages to be unconscionable. However, the dependent approach strips away limitations of consequential damages whenever a limited remedy fails of its essential purpose, without regard to the good or bad faith of the seller, which we believe goes too far.

The objections to the independent approach in *Soo Line* and the law review article noted above are similarly unpersuasive. Both argue that the independent approach is unfair because the buyer may not intend to renounce consequential damages when the limited remedy has failed of its essential purpose. *Soo Line*, 547 F.2d at 1373; 74 Cornell L. Rev. at 364. But this seems to ignore the plain language of the contract in a fundamental way—for if the buyer does not intend to renounce consequential damages when the limited remedy has failed, in what context *could* the disclaimer of conse-

quential damages operate? As noted above, we believe this is a fundamental defect in the dependent approach, that it renders the disclaimer of consequential damages an utter nullity. If a limited remedy has *not* failed of its essential purpose, that is of course the buyer's only remedy, by definition—this is what it means to have a limited remedy. So in this circumstance a disclaimer of limited damages would be of no effect because it would be redundant. If, as the above critics argue, the disclaimer of limited damages ought not to be enforced when the limited remedy *has* failed of its essential purpose, the language would never have any effect. Moreover, to the extent that the independent approach encourages parties to pay attention in the drafting process (see 74 Cornell L. Rev. at 363), we see this as a point in favor of the independent approach, rather than the contrary.

Plaintiff objects that Illinois has always followed the dependent approach, and for this court now to endorse the independent approach would unnecessarily reverse "thirty-five (35) years of commercial law in the State of Illinois law that has repeatedly embraced the `dependent' approach." We disagree with the premise of this argument. It is true that *Adams* endorsed the dependent approach over 35 years ago. See *Adams*, 125 Ill. App. 2d at 402-03. But intervening case law from our appellate court has not consistently followed the dependent approach. More recently, for instance, our appellate court stated:

"In remedy limitation cases, the court must make three inquiries:

> '(1) whether the contract limited the remedy to repair or replacement; (2) whether, if the remedy were so limited, it failed of its essential purpose; and (3) whether, *if the limited remedy failed of its essential purpose*, consequential damages may be recovered because their exclusion is unconscionable.'" (Emphases added.) *Intrastate Piping & Controls, Inc. v. Robert James Sales,*

> *Inc.*, 315 Ill. App. 3d 248, 256 (2000), quoting *Myrtle Beach Pipeline Corp. v. Emerson Electric Co.*, 843 F. Supp. 1027, 1041 (D.S.C. 1993).

Regardless of whether this language is *dictum*, as plaintiff argues, it is a clear endorsement of the independent approach. Other case law has evinced a confusion as to whether the independent or dependent approach is to be followed. Compare *Lara v. Hyundai Motor America*, 331 Ill. App. 3d 53, 61 (2002) (quoting the above "three inquiries" language from *Intrastate Piping*), with *Lara*, 331 Ill. App. 3d at 63 (holding that "[i]f *** the limited remedy of replacement or repair of defective parts failed of its essential purpose, the express warranty's exclusion of consequential and incidental damages will have no effect and those damages will be available to plaintiff pursuant to the UCC"). We note also that in that portion of its opinion which endorsed the dependent approach, the *Lara* court—like *Adams*—cited section 2-719(2) of the UCC but failed to acknowledge section 2-719(3). See *Lara*, 331 Ill. App. 3d at 63; *Adams*, 125 Ill. App. 2d at 403. Illinois decisions dealing with the independent/dependent issue under the UCC have not been consistent. We believe that it is appropriate and necessary that we decide this question.

Moreover, we disagree with the reasoning, although not necessarily the result, in *Adams*. There, in refusing to enforce the consequential damages limitation, our appellate court focused on the allegedly tortious nature of defendants' conduct which caused the limited remedy to fail of its essential purpose. The court concluded that defendants were entitled to none of the protections included in the contract because they had "repudiat[ed] *** their obligations under the warranty." This implies that the sellers' alleged bad faith in repudiating their obligations under the warranty played a part in the analysis—but the dependent approach does not take the seller's good or bad faith into account. Under the

dependent approach, the seller is stripped of the protection of a consequential damages disclaimer once a limited remedy has failed of its essential purpose, *regardless* of the seller's good or bad faith.

A seller's deliberate or negligent failure to supply a limited remedy can be taken into consideration in determining whether enforcement of a consequential damages waiver is unconscionable. The unconscionability determination is not restricted to the facts and circumstances in existence at the time the contract was entered into. *Pierce*, 2 P.3d at 623, quoting *Chatlos Systems*, 635 F.2d at 1087 ("in addition to inquiring into the circumstances at the time of the sale, courts examine the case 'from the perspective of later events'"). Indeed, section 2-719(3) itself expressly provides that matters which become known only subsequent to the drafting of the contract—*i.e.*, the type of injuries suffered as a result of breach—are relevant to the unconscionability calculus. 810 ILCS 5/2-719(3) (West 2000) ("Limitation of consequential damages for injury to the person in the case of consumer goods is prima facie unconscionable but limitation of damages where the loss is commercial is not"); see also 810 ILCS 5/2-719, Uniform Commercial Code Comment 3, at 488 (Smith-Hurd 1993) ("clauses limiting or excluding consequential damages * * * may not *operate* in an unconscionable manner" (emphasis added)). As many of the authorities favoring the dependent approach have noted, there is rarely any basis for concluding that when the parties entered into their contract, the buyer intended to assume the risk of the seller's willful or negligent default on his only obligation for breach of warranty.[3] It may well be that in a case such as *Adams*, where the defendant is alleged to have acted in bad faith, the correct result would be to declare a consequential

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[3] However, as we previously observed, we do not find this to be a compelling argument for the dependent approach itself, which strikes consequential damage limitations regardless of the seller's good faith.

damages exclusion unenforceable. See *McNally Wellman Co. v. New York State Electric & Gas Corp.*, 63 F.3d 1188, 1198 n.9 (2d Cir. 1995) (noting that "section 1-203 of the UCC, which states that '[e]very contract or duty within this Act imposes an obligation of good faith in its performance or enforcement,'" supports the conclusion that bad faith could vitiate a section 2-719(3) consequential damages exclusion). Accordingly, we believe that a plaintiff must be allowed to point to a defendant's conduct, or any other circumstance which he believes would make enforcement of a consequential damages exclusion unconscionable. But the plain language of the UCC indicates that this step, of evaluating whether the exclusion is unconscionable, must be taken before a contractual consequential damages exclusion may be done away with. See 810 ILCS 5/2-719(3) (West 2000).

We conclude that the independent approach is the better-reasoned and more in accordance with the plain language of the UCC. This conclusion is buttressed by the fact that a majority of jurisdictions to consider the issue have adopted the independent approach. Illinois generally follows the majority interpretation of UCC provisions, in order to serve the underlying UCC policy of "'mak[ing] uniform the law among the various jurisdictions.'" *Connick v. Suzuki Motor Co.*, 174 Ill. 2d 482, 491 (1996), quoting 810 ILCS 5/1-102(2)(c) (West 1994). Contractual limitations or exclusions of consequential damages will be upheld unless to do so would be unconscionable, regardless of whether the contract also contains a limited remedy which fails of its essential purpose.

B. *Unconscionability*

Accordingly, the mere fact that the jury found the limited remedy to have failed of its essential purpose does not destroy the provision in the warranty excluding consequential damages. However, this does not mean that the exclusion of consequential damages will necessarily be upheld. Rather,

that provision must be judged on its own merits to determine whether its enforcement would be unconscionable. 810 ILCS 5/2-719(3) (West 2000).

A determination of whether a contractual clause is unconscionable is a matter of law, to be decided by the court. 810 ILCS 5/2-302(1) (West 2000); *Frank's Maintenance & Engineering, Inc. v. C.A. Roberts Co.*, 86 Ill. App. 3d 980, 989 (1980). Unconscionability can be either "procedural" or "substantive" or a combination of both. *Frank's Maintenance*, 86 Ill. App. 3d at 989. But see *Rosen v. SCIL, LLC.*, 343 Ill. App. 3d 1075, 1081 (2003) (for a term to be found unconscionable, it must be both procedurally and substantively unconscionable); 1 Farnsworth, Farnsworth on Contracts §4.28, at 585 (3d ed. 2004) ("Most cases of unconscionability involve a combination of procedural and substantive unconscionability," although contracts may be voidable without substantive unconscionability if the procedural unconscionability is sufficiently severe). Procedural unconscionability refers to a situation where a term is so difficult to find, read, or understand that the plaintiff cannot fairly be said to have been aware he was agreeing to it, and also takes into account a lack of bargaining power. *Frank's Maintenance*, 86 Ill. App. 3d at 989. Substantive unconscionability refers to those terms which are inordinately one-sided in one party's favor. Rosen, 343 Ill. App. 3d at 1081.

Hyundai argues that plaintiff introduced no evidence to support the trial court's determination that the consequential damages exclusion was unconscionable. We disagree. The record reveals a number of facts which tend to support a finding of unconscionability. The warranty was entirely preprinted. Plaintiff—a consumer—had no hand in its drafting, and no bargaining power at all with respect to its terms. Moreover, the clause in question is intended to limit the drafter's liability. Each of these facts leads this court to disfavor the clause. See *Pierce*, 2 P.3d at 623 ("Courts are

more likely to find unconscionability when a consumer is involved, when there is a disparity in bargaining power, and when the consequential damages clause is on a pre-printed form"); *Frank's Maintenance*, 86 Ill. App. 3d at 992 (although UCC permits clauses limiting remedies, such clauses are disfavored and must be strictly construed). However, we need not—and we do not—hold that these general circumstances alone or in combination render the clause unconscionable.

An additional fact particular to this case tips the balance in plaintiff's favor. That is the lack of evidence that the warranty, which contained the disclaimer of consequential damages, had been made available to the plaintiff at or before the time she signed the sale contract. The warranty and its consequential damages exclusion were contained in the owner's manual, which was placed in the glove compartment of the car, where it was unavailable to the consumer until after she took delivery. No portion of the sale contract contained in the record before us even mentions the warranty. Moreover, plaintiff testified without contradiction that she never saw any part of the written warranty, much less the disclaimer of consequential damages, until she looked in her owner's manual after she had signed the contract and driven the car off the lot. Thus, *on this record*, we must conclude that the warranty information, including the disclaimer of consequential damages, was not made available to the plaintiff at or before the time she signed the purchase contract.

In its petition for rehearing, Hyundai argues that the disclaimer is not procedurally unconscionable because it was written in capital letters in "plain, simple, understandable language, not legalese," that was "easy to see and easy to read." These aspects of the disclaimer are irrelevant, however, in the case of a limitation of liability withheld from the buyer until after the purchase contract has been signed. It simply does not matter how large the type was or how clearly

the disclaimer was expressed if the consumer did not have the opportunity to see the language before entering into the contract to purchase the car. See *Frank's Maintenance*, 86 Ill. App. 3d at 991 n.2. As previously noted, procedural unconscionability refers to a situation where a term is so difficult to find, read, or understand that the plaintiff cannot fairly be said to have been aware he was agreeing to it. Surely, whatever other context there might be in which a contractual provision would be found to be procedurally unconscionable, that label must apply to a situation such as the case at bar where plaintiff has testified that she never saw the clause nor is there any basis for concluding that plaintiff *could* have seen the clause, before entering into the sale contract. "[A] limitation of liability given to the buyer after he makes the contract is ineffective." *Frank's Maintenance*, 86 Ill. App. 3d at 991 n.2.

In seeking a rehearing, Hyundai protests that our conclusion that in this case the disclaimer was unconscionable and thus unenforceable will have catastrophic effects on commerce. The basis of Hyundai's complaint is that the warranty, which runs between Hyundai and plaintiff, is not a term of the sale contract, which was formed between Gartner and plaintiff and to which Hyundai is not a party. Hyundai argues that it is wholly unfair to condition enforceability of the terms of the warranty on anything having to do with the sale contract, because there is no evidence that Hyundai has any control over the terms of the sale contract. Hyundai protests that we have erred in holding that the disclaimer in its warranty is unenforceable simply because that warranty was not included in the sale contract. Some clarification is in order.

First, Hyundai offers no support for its argument that it is unfair to bind a manufacturer by the actions of a seller. Our own research has not unearthed a great deal of sympathy for such an argument. See, *e.g.*, *Wilbur v. Toyota Motor Sales, U.S.A.*, 86 F. 3d 23 (2d Cir. 1996) (refusing to enforce dis-

claimer in manufacturer's warranty because of date which dealer entered in sale contract). More importantly, Hyundai's arguments proceed from a misunderstanding of our holding. We did not intend to condition enforceability of the provisions of manufacturer's warranties on their inclusion in sale contracts *per se*. Rather, our concern was that *in this case*, there was no evidence that plaintiff had been by *any* means provided with the terms of the warranty—specifically the disclaimer of consequential damages—at or before the time she signed the sale contract. One of the ways in which plaintiff could potentially have received the warranty is if it had been contained in the sale contract which she signed, but this is not the only possibility. Our point was simply that notice of the contents of the warranty must be provided to the purchaser at or before the time that the purchase occurs, and the evidence in this case is wholly and completely to the contrary.

Perhaps inadvertently, Hyundai has validated our legal analysis in its petition for rehearing. As Hyundai there admits, the Magnuson-Moss Act requires the Federal Trade Commission (FTC) to enact a regulation "requiring that the terms of any written warranty on a consumer product be made available to the consumer (or prospective consumer) prior to the sale of the product to him." 15 U.S.C. §2302(b)(1)(A) (1994). Pursuant to this authority, as Hyundai notes, the FTC has enacted a regulation that provides:

> "*A written warranty* must be 'part of the basis of the bargain.' This means that it *must be conveyed at the time of sale of the consumer product* and the consumer must not give any consideration beyond the purchase price of the consumer product in order to benefit from the agreement." (Emphasis added.) 16 C.F.R. §700.11(b) (2000).

We appreciate Hyundai directing our attention to this regulation because it reveals that although our focus was cor-

rect—a buyer must at least be given the opportunity to learn the terms of a warranty at the time the sale contract is signed—we actually gave plaintiff too *little* protection in our initial disposition of the case. We would have been content if the warranty was merely *referred to* in the sale contract, whereas the FTC regulation clearly and unambiguously requires that the written warranty *itself* must be *conveyed* at the time of sale. 16 C.F.R. §700.11(b) (2000). So far as the record in this case is concerned, no such conveyance took place.

Again, the result in this case rests wholly on the evidence adduced and the arguments raised in this case. Hyundai contends on rehearing that it did "provid[e] the limited warranty at the time [plaintiff] bought the Sonata," but the record in this case does not bear that assertion out—there is no evidence, documentary or testimonial, to support Hyundai's bald assertion that plaintiff was provided a copy of the warranty at the time the sale contract was signed. This is not a matter of shifting the burden of proof to Hyundai (as Hyundai additionally complains on rehearing),[4] because the fact is that

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[4] Hyundai also objects on rehearing that it is unfair to uphold the circuit court's ruling on unconscionability because plaintiff never argued unconscionability in her complaint. Hyundai protests that, because of this, Hyundai did not receive a fair chance to present evidence on the validity of its exclusion, and argues that we ought to treat the unconscionability argument as waived. However, we note that the court's initial ruling regarding unconscionability occurred at the time of Hyundai's motion for a directed verdict at the close of plaintiff's case, before Hyundai began its case—Hyundai therefore did indeed have a chance to put on evidence during its case in chief, if it had desired to do so. More importantly, Hyundai never argued at the circuit court level that plaintiff had waived unconscionability, and never suggested that the court's ruling thereon was procedurally unfair, neither at the time of the court's ruling nor in its postjudgment motion. If Hyundai had made this argument in a timely fashion, the trial court could have dealt with it, either reversing its ruling or possibly amending the pleadings to conform to the proofs. Hyundai complains that by failing to argue unconscionability in her pleadings plaintiff waived that theory, but Hyundai, by failing to argue *waiver*

plaintiff did produce affirmative evidence that she had never seen the warranty until after she had purchased the vehicle. Plaintiff directly and unequivocally so testified during her case in chief. Hyundai simply failed to rebut this evidence when it had the chance. The only possible conclusion based on the evidence adduced by both parties at trial is that, in direct violation of section 700.11(b) (16 C.F.R. §700.11(b) (2000)), the warranty was not conveyed to plaintiff at the time of sale. We note that other portions of the C.F.R. appear to differentiate between the duties of a warrantor—such as Hyundai—and the duties of a seller—such as Gartner. See, *e.g.*, 16 C.F.R. §702.3 (2000). However, Hyundai has chosen not to rely on this distinction. To the contrary, Hyundai contends that "by providing the limited warranty at the time [plaintiff] bought the Sonata, Hyundai complied with both the FTC Rules and the [Magnuson-Moss] Act." An argument could be made that Hyundai has implicitly *accepted* responsibility for transmitting the warranty to plaintiff. At the very least, however, it is clear that Hyundai has utterly failed to raise any argument based on section 702.3 or any differentiation of responsibility between itself and Gartner. We decline to accept the dissent's invitation to consider section 702.3 *sua sponte* and decide this issue on the basis of an argument the parties have never made, not in the circuit court, the appellate court, initial briefing before this court, nor even on rehearing. We intimate no suggestion as to what the outcome of this or any future case might be if this or any other argument were properly raised before this court or the circuit court (see *supra* footnote 4, discussing Hyundai's failure to raise waiver before circuit court).

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before the trial court, has itself waived this waiver argument. See 155 Ill. 2d R. 366(b)(2)(iii); *Bullard v. Barnes*, 102 Ill. 2d 505, 519 (1984); *Fitzpatrick v. ACFProperties Group, Inc.*, 231 Ill. App. 3d 690, 697 (1992).

To enforce the clause in these circumstances, we conclude, would indeed be unconscionable. See *Frank's Maintenance*, 86 Ill. App. 3d at 991 n.2 ("a limitation of liability given to the buyer after he makes the contract is ineffective"). Accordingly, we affirm the circuit court's order to that effect, as well as the $3,500 which represents that portion of the jury verdict intended to recompense plaintiff for the consequential damages she incurred.

II. Warranty Damages

The next issue concerns the jury's $5,000 warranty damage award for the decreased value of the car due to the no-start condition. Hyundai does not object to the jury's conclusion that the vehicle was defective or that the limited remedy failed of its essential purpose. Rather, Hyundai contends merely that there was no evidence to support the jury's damages award, and argues that because the award can only have represented a guess by the jury, the court should have entered judgment notwithstanding the verdict (*n.o.v.*) in Hyundai's favor. Plaintiff responds that she is not required to prove damages with mathematical precision, and argues that there was sufficient evidence on damages for the case to go to the jury.

As the appellate court noted, the standard for entry of judgment *n.o.v.* is a high one:

> "A court may enter a judgment *n.o.v.* only when, viewing the evidence in a light most favorable to the nonmoving party, it so overwhelmingly favors the movant that a contrary verdict could not stand. [Citation.] A defendant's motion for judgment *n.o.v.* presents ' "a question of law as to whether, when all of the evidence is considered, together with all reasonable inferences from it in its aspect most favorable to the plaintiffs, there is a total failure or lack of evidence to prove any necessary element of the plainti$['s] case.'" [Citation.]" 349 Ill. App. 3d at 658.

Because the limited remedy failed of its essential purpose, plaintiff was entitled to pursue the other remedies afforded by the UCC. 810 ILCS 5/2-719(2) (West 2000). Under the UCC, "The measure of damages for breach of warranty is the difference at the time and place of acceptance between the value of the goods accepted and the value they would have had if they had been as warranted, unless special circumstances show proximate damages of a different amount." 810 ILCS 5/2-714(2) (West 2000). "While it is not necessary that damages for breach of warranty be calculated with mathematical precision [citation], basic contract theory requires that damages be proved with reasonable certainty and precludes damages based on conjecture or speculation [citation]." *Ouwenga v. Nu-Way Ag, Inc.*, 239 Ill. App. 3d 518, 523 (1992). Accord *Mitsch v. General Motors Corp.*, 359 Ill. App. 3d 99, 104 (2005); *Valenti v. Mitsubishi Motor Sales of America, Inc.*, 332 Ill. App. 3d 969, 973. (2002). See also *Midland Hotel Corp. v. Reuben H. Donnelley Corp.*, 118 Ill. 2d 306, 315-16 (1987) ("In order to recover lost profits, it is not necessary that the amount of loss be proven with absolute certainty. However, recovery of lost profits cannot be based upon conjecture or sheer speculation. [Citation.] It is necessary that the evidence afford a reasonable basis for the computation of damages").

In this case there was no sufficient basis for the jury's $5,000 award. There was no documentary evidence submitted on the damages question, nor expert testimony. The only possible evidence of how much the vehicle's value decreased is plaintiff's testimony, and plaintiff's only testimony which touches on the subject was that she would not today pay the price she had originally paid for the vehicle, because "given the problems that this vehicle—that I have had with this vehicle or the problems the vehicle has had, that's like a used car. I would not pay that for a new car with used problems as it were." There is simply no way for the jury to get from this testimony to a $5,000 award without engaging in speculation

and conjecture. "'[I]n proving damages, the burden is on the plaintiff to establish a reasonable basis for computing damages.'" *Snelson v. Kamm*, 204 Ill. 2d 1, 33 (2003), quoting *Gill v. Foster*, 157 Ill. 2d 304, 313 (1993). In this case, plaintiff failed to do so.

Plaintiff notes that the price of the car was also entered into evidence and suggests that jurors have sufficient familiarity with cars and breakdowns that they ought to be permitted to determine for themselves how much a car's value would be diminished by events of the type which occurred in this case. Plaintiff cites a number of cases which suggest that damages may be proven in any manner which is "reasonable," and also notes that our appellate court has held that "[w]here the right of recovery exists the defendant cannot escape liability because the damages are difficult to prove." *Burrus v. Itek Corp.*, 46 Ill. App. 3d 350, 357 (1977).

We agree that damages may be proven in any reasonable manner, as a general proposition of law (see, *e.g., Snelson*, 204 Ill. 2d at 33) but this begs the question whether damages were proven in a reasonable manner in this case. The answer is clearly no. Although jurors are not required to check their common sense at the courtroom door (see *People v. Steidl*, 142 Ill. 2d 204, 238 (1991)), we are not prepared to endorse the proposition that jurors are as a class sufficiently familiar with automobiles as to be able to determine the degree of diminution of a particular vehicle's value based on a particular defect without the need for any evidence at all. This is more than a matter of simple common sense. Plaintiff testified, in essence, that "It wasn't worth what I paid for it." There was no number presented, nothing for the jury to work from.

Plaintiff argues that the Magnuson-Moss Act and the UCC are to be construed liberally, and argues that when a plaintiff proves he has suffered damages, the defendant ought not to escape liability simply because the precise measure of the damages is difficult to ascertain. See *Burrus v. Itek Corp.*, 46

Ill. App. 3d 350, 357 (1977). We again agree with these propositions as a general matter. But regardless, even assuming that plaintiff suffered some damage, there must be some basis for a jury's damage award, and we can see no process other than speculation by which the jury could have translated the evidence presented by plaintiff to an award of $5,000. We note that even in *Burrus*, itself a UCC case in which a dissatisfied buyer was attempting to recover for the value of defective goods, the record included "testimony" as to "the actual value of the defective [goods] at time of acceptance." *Burrus*, 46 Ill. App. 3d at 357. In this case, by contrast, there is nothing, truly not a scintilla of evidence to support any particular verdict at which the jury might have arrived—much less the suspiciously round number of $5,000.

However, we feel compelled to note that plaintiff attempted to introduce such evidence. During plaintiffs case in chief, the circuit court precluded plaintiff's counsel's from asking plaintiff how much she would have paid for the car if she had known of the defects. This was error, and it was only because of this error that plaintiff failed to prove damages. Although the decision whether a witness is competent to testify is a matter within the trial court's discretion, lay witnesses are permitted to give their opinion as to the value of property if they have sufficient personal knowledge of the property and its value. *State Farm General Insurance Co. v. Best in the West Foods, Inc.*, 282 Ill. App. 3d 470, 483 (1996). It is true that there must be an adequate showing of the basis for such testimony before it will be allowed (*Best in the West Foods*, 282 Ill. App. 3d at 483), but in this case, the circuit court preemptively ruled that plaintiff would not be permitted to testify as to value before plaintiff's counsel could attempt to establish the foundation of plaintiff's knowledge as to the value of the vehicle. As previously noted, the court ruled that plaintiff could testify

> "as to what her feelings were, what her frame of mind was and the impact of the slow [*sic*] start situation on her

> personal feelings. * * * But as to 'the value of the vehicle would have been such and such because of the no start conditions,'. I don't see how you're going to go that far with it."

This was clearly erroneous.

Accordingly, although plaintiff's case failed for proof of damages, it would be entirely unjust to reverse the verdict outright. As previously noted, "[w]here the right of recovery exists the defendant cannot escape liability because the damages are difficult to prove." *Burrus*, 46 Ill. App. 3d at 357 (1977). Accord *McGrady v. Chrysler Motors Corp.*, 46 Ill. App. 3d 136, 140 (1977). Therefore, pursuant to our authority under Supreme Court Rule 366(a)(5) (155 Ill. 2d R. 366(a)(5)), we reverse and remand for a new trial solely on the question of the warranty damages to which plaintiff is entitled. See *Ford Motor Co. v. Cooper*, 125 S.W.3d 794, 804 (Tex. Civ. App. 2004) (noting that "appellate courts have reversed for a new trial where, among other circumstances, the plaintiff failed to show damages with reasonable certainty, but the interests of justice required the plaintiff be given an opportunity to show the proper measure of his or her damages," and remanding for new trial, where jury awarded plaintiff $5,000 for breach of automobile warranty without sufficient evidence of value as delivered).

At this new trial, plaintiff's counsel must not be precluded from attempting to lay a foundation for plaintiff's knowledge of the value of the car. However, of course, the evaluation of the sufficiency of whatever foundation may be laid to establish plaintiff's personal knowledge of the value of the car will be within the circuit court's discretion (*Best in the West Foods*, 282 Ill. App. 3d at 483); we are not prejudging this question in favor of either party.

III. Attorney fees

Hyundai admits that the Magnuson-Moss Act permits the court to award attorney fees to a victorious plaintiff. See 15 U.S.C. §2310(d)(2) (2000). Hyundai's only argument here is that once we have reversed the entire verdict in plaintiff's favor, plaintiff cannot be considered "victorious," and accordingly we must also reverse the fee award. Hyundai does not argue nor even suggest that a partial reversal requires that we remand the cause to the circuit court to recalculate the fees to which plaintiff's counsel would be entitled. However, we have not reversed the entire verdict in plaintiff's favor. Accordingly, this argument fails.

CONCLUSION

For the reasons given above, the judgment of the appellate court is affirmed in part and reversed in part, and the judgment of the circuit court is also affirmed in part and reversed in part. We remand for a new trial on the issue of warranty damages.

Appellate court judgment affirmed in part
and reversed in part;
circuit court judgment affirmed in part
and reversed in part;
cause remanded

Dissent Upon Denial of Rehearing

JUSTICE McMORROW, *dissenting*:

I initially joined the majority opinion in this case. I remain in agreement with the majority in its adoption of the independent approach in analyzing limitations of remedy and disclaimers of consequential damages. However, in light of arguments regarding unconscionability that were raised in Hyundai's petition for rehearing, as well as subsequent changes made by the court to its opinion, I believe that rehearing should be allowed.

As Hyundai notes in its petition for rehearing, "[t]he effect of this Court's decision could be tremendous, and [could] impact all manufacturers of goods sold in Illinois." The majority's unconscionability determination imposes an impossible burden on manufacturers and in the process provides a powerful disincentive for manufacturers to offer written warranties. In addition, the majority's decision on this issue runs counter to federal regulations dealing with the allocation of responsibility between manufacturers and sellers. This novel decision represents a dramatic change in state contract law governing warranty exclusions and undoubtedly will have a far-reaching impact.

In part (I)(B) of its opinion, the majority holds, as a matter of state contract law, that Hyundai's exclusion of consequential damages in its manufacturer's limited warranty is procedurally unconscionable and therefore may not be enforced. Two factual points form the basis of the majority's unconscionability determination: (1) the lack of evidence that the warranty was present or even referred to in Gartner's sales contract, and (2) plaintiffs testimony that she never saw any part of Hyundai's written warranty, including the disclaimer of consequential damages, until she looked in her owner's manual after she had signed the sales contract and driven the car off the lot. The majority notes that procedural uncon-

scionability refers, *inter alia*, to a situation where a term is so difficult to find, read, or understand that a plaintiff cannot fairly be said to have been aware that she was agreeing to it. With this definition in mind, the majority states: "[W]hatever other context there might be in which a contractual provision would be found to be procedurally unconscionable, that label must apply to a situation such as the case at bar where plaintiff has testified that she never saw the clause nor is there any basis for concluding that plaintiff *could* have seen the clause before entering into the sale contract." (Emphasis in original.) Slip op. at 20. In other words, the consequential damages clause was difficult to find or read (and therefore procedurally unconscionable), not because it was in small print or because it was relegated to the back of the contract, but rather because, based on the record evidence, it was not "made available to the plaintiff at or before the time she signed the sale contract." Slip op. at 20.

In support of its ruling that Hyundai's consequential damages clause is unconscionable, the majority points to 16 C.F.R. §700.11(b), a Federal Trade Commission (FTC) regulation dealing with written warranties. Section 700.11(b) states, in pertinent part:

> "A written warranty must be 'part of the basis of the bargain.' This means that it must be conveyed at the time of sale of the consumer product ***." 16 C.F.R. §700.11(b) (2000).

This requirement that the warranty "must be conveyed at the time of sale" raises two questions. First, what is meant by "conveyed at the time of sale"? The majority takes the position that, in order for the warranty to be conveyed at the time of sale, it must be made available to the purchaser at or before the time the purchaser signs the sales contract. In the case at bar, as noted, the warranty was included in the owner's manual, which was in the glove compartment of the car, and plaintiff apparently did not see the warranty until

after she signed the purchase contract and drove the car off the lot. In the majority's view, the inclusion of the warranty in the glove compartment of the car did not constitute the conveying of the warranty at the time of sale. However, Hyundai appears to argue in its petition for rehearing that such inclusion of the warranty in the glove compartment did constitute providing the warranty "at the time of sale." The majority disagrees, but cites to no authority for its contrary interpretation of this phrase.

A more important question with regard to this requirement is whether it is the warrantor or the retail seller who bears the burden of conveying the warranty at the time of sale. Section 700.11(b) does not say. However, this question is answered by section 702.3 (16 C.F.R. §702.3 (2000)). Section 702.3(a), which describes the duties of a seller, provides, in pertinent part:

> "[T]he seller of a consumer product with a written warranty shall make a text of the warranty readily available for examination by the prospective buyer by:
>
> (1)Displaying it in close proximity to the warranted product, or
>
> (2)Furnishing it upon request prior to sale and placing signs reasonably calculated to elicit the prospective buyer's attention in prominent locations in the store or department advising such prospective buyers of the availability of warranties upon request." 16 C.F.R. §702.3(a) (2000).

Section 702.3(b), which describes the duties of a warrantor, provides, in pertinent part, that a warrantor shall:

> "Provide sellers with warranty materials necessary for such sellers to comply with the requirements set forth in paragraph (a) of this section, by the use of one or more by the following means:

> (A) Providing a copy of the written warranty with every warranted consumer product[.]" 16 C.F.R. §702.3(b)(1)(i) (2000).

Under section 702.3, it is the *retail seller's* obligation to make the written warranty available to the prospective buyer at the point of sale. The manufacturer, on the other hand, is required only to provide the retail seller with the warranty materials that the seller will need to meet this obligation. 16 C.F.R. §§702.3(a), (b)(1)(i) (2000). Thus, in the case at bar, it was Gartner's obligation to make the written warranty available to plaintiff Hyundai's obligation, on the other hand, was merely to provide Gartner with the necessary warranty materials. It is undisputed that Hyundai satisfied this requirement.

The majority acknowledges section 702.3 and its allocation of responsibility between the warrantor and the seller. However, the majority asserts that Hyundai has waived any argument based on section 702.3. The majority states:

> "[I]t is clear that Hyundai has utterly failed to raise any argument based on section 702.3 or any differentiation of responsibility between itself and Gartner. We decline to accept the dissent's invitation to consider section 702.3 sua sponte and decide this issue on the basis of an argument the parties have never made, not in the circuit court, the appellate court, initial briefing before this court, nor even on rehearing." Slip op. at 23.

The majority emphasizes that an argument based on section 702.3 was not raised by the parties in the circuit court, the appellate court, or in initial briefing before this court. The reason Hyundai did not raise this argument in the lower courts or on initial briefing before this court is that it was unnecessary. No argument that Hyundai's consequential damages exclusion was procedurally unconscionable was

raised in the courts below or in plaintiff's brief to this court.[1] With regard to Hyundai's petition for rehearing, the majority is incorrect in asserting that Hyundai "utterly failed" to raise an argument based on differentiation of responsibility. Hyundai pointed in its petition to "the very different roles" of the warrantor and the seller regarding the sales transaction in the case at bar. It is true that, in making this argument, Hyundai failed to cite specifically to section 702.3 of the FTC regulations. However, the majority's invocation of waiver in this instance, solely because Hyundai failed to cite to the appropriate section of the regulations, constitutes, in my view, an overly technical application of the waiver doctrine. See *In re D.F.*, 208 Ill. 2d 223, 23 8-39 (2003) (the rule of waiver is a limitation on the parties and not on the court).

The majority's application of the waiver doctrine is objectionable for a more fundamental reason as well. In explaining its waiver decision, the majority asserts that it will not address *sua sponte* an argument on behalf of Hyundai that was not raised below. However, the majority fails to note that its own procedural unconscionability rationale for declining to enforce Hyundai's exclusion was itself raised *sua sponte*. As previously indicated, no argument was raised in the courts below or in plaintiffs brief to this court that Hyundai's consequential damages exclusion was procedurally unconscionable because Hyundai failed to make its warranty available to plaintiff at the time she signed the purchase contract. This argument is raised for the first time by this court in its opinion in the case at bar. The unavoidable implication of the majority's refusal to consider the section

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[1] In her brief to this court, plaintiff did contend that the disclaimer at issue was unconscionable. However, in making this argument, which consisted of a single paragraph that contained a block quote, plaintiff contended that Hyundai's warranty exclusion was substantively unconscionable in that it was "an invalid contract of adhesion." Plaintiff did not argue that the warranty exclusion was procedurally unconscionable.

702.3 contention is that it is perfectly acceptable for this court to raise, *sua sponte*, an argument on behalf of one party, while nevertheless declining to consider, *sua sponte*, an argument on behalf of the opposing party. While I do not believe that the majority intends this implication, it necessarily follows, and it undoubtedly will be a message taken from the majority's decision in this case.

The majority attempts to limit the impact of its procedural unconscionability holding by asserting that the outcome might be different if section 702.3 were properly raised. The majority states:

> "We intimate no suggestion as to what the outcome of this or any future case might be if this or any other argument were properly raised before this court or the circuit court." Slip op. at 23. I disagree with this assertion. The majority today concludes, as a matter of state contract law, that an exclusion in a limited warranty is unenforceable where a manufacturer fails to make the warranty available to the consumer at or before the time the purchase contract is signed. While the relevant FTC regulations contradict this holding, these regulations are not necessarily controlling. The majority cites to section 700.11(b) merely as support for its holding that Hyundai's warranty exclusion is unconscionable. The majority's decision regarding the unconscionability of warranty exclusions will stand regardless of whether section 702.3 is properly raised in a future case.

I note, in addition, that there are difficulties with the majority's unconscionability holding even when considered solely as a matter of state contract law, without reference to the federal regulations. In finding Hyundai's consequential damages disclaimer unconscionable, the majority concludes that this exclusion is void and unenforceable as a matter of public policy. The clear implication of such a holding is that Hyundai did something wrong, such as hiding the exclusion

"in a maze of fine print." *Frank's Maintenance & Engineering, Inc. v. C.A. Roberts Co.*, 86 Ill. App. 3d 980, 990 (1980). However, in the case at bar Hyundai committed no such infraction. Instead, Hyundai's transgression was that it failed to make the warranty "available to the plaintiff at or before the time she signed the sale contract." Slip op. at 20. This raises the question of how Hyundai could have avoided this transgression and ensured that the warranty was conveyed to plaintiff. The majority insists that the inclusion of the warranty in the purchase contract is not the only way in which "plaintiff could * * * have received the warranty." There are other possibilities, the majority asserts, but these possibilities are not identified. Slip op. at 21.

If the warranty must be made available to the consumer at or before the time the purchase contract is signed, and if, as the majority concludes, the warrantor may not rely on the seller to meet this responsibility, then there is, in my view, only one possible way in which the warrantor could satisfy this obligation. The warrantor must have a representative physically present on the seller's premises to make sure that the warranty is conveyed to the consumer, thereby ensuring the warranty's enforceability. A moment's reflection reveals the unreasonableness of such a requirement. Under the majority's holding, which is not limited to automobile manufacturers, any manufacturer who warrants a product sold at a retail outlet would need to hire representatives for each of the many such outlets that sold the manufacturer's products. This is an impossible burden to place on the manufacturer. It is unreasonable for the majority to hold Hyundai responsible for failing to do something that cannot realistically be achieved.

There is another way in which the majority's decision here is objectionable. The majority reasons that, because Hyundai's consequential damages disclaimer was not provided to plaintiff at or before the time she signed the purchase contract, this exclusion was not part of the agreement and is void

and unenforceable. However, according to the record evidence cited by the majority, it was the entire warranty, and not just the consequential damages exclusion, that was unavailable to plaintiff at the time she signed the contract. As the majority asserts:

> "[P]laintiff testified without contradiction that she never saw any part of the written warranty, much less the disclaimer of consequential damages, until she looked in her owner's manual after she had signed the contract and driven the car off the lot. Thus, *on this record*, we must conclude that the warranty information, including the disclaimer of consequential damages, was not made available to the plaintiff at or before the time she signed the purchase contract." (Emphasis in original.) Slip op. at 20.

Under the majority's reasoning, if the consequential damages exclusion is void because it was not made available to plaintiff and was not part of the agreement entered into by plaintiff, the same is also true of the warranty as a whole. It follows that, if the warranty itself is void, *i.e.*, not part of the agreement, plaintiff should not be able to bring suit against Hyundai under the warranty. Nevertheless, in the case at bar, the majority holds, *sua sponte*, that Hyundai's exclusion is void because it was not conveyed to plaintiff. The majority does not, however, reach the same conclusion regarding the warranty as a whole. This is inconsistent.

The majority's holding regarding Hyundai's consequential damages disclaimer is objectionable for yet another reason. In my view, the majority's decision on this issue is detrimental to consumers. By holding that Hyundai's consequential damages exclusion is unenforceable because Hyundai failed to do something that it could not realistically accomplish, the majority is discouraging manufacturers from offering written warranties at all. While a manufacturer's decision to provide such warranties undoubtedly is influenced by competitive

pressures, the benefits of offering a warranty will be considerably diminished if the manufacturer has no control over the scope of the warranty offered. Under the majority's holding, the ability of a manufacturer to control this scope through exclusions such as a disclaimer of consequential damages is severely constrained, if not eliminated. Faced with such a prospect, a manufacturer might very well conclude that it is no longer cost effective to offer a written warranty. Such a result would indeed be anticonsumer.

In its petition for rehearing, Hyundai argues that the majority erred in basing its unconscionability determination on the lack of evidence that the warranty was included in the purchase contract. Hyundai contends that, as a warrantor, it has no control over the terms of the sales contract, which is between Gartner (not Hyundai) and plaintiff, and is a document entirely separate from the warranty between Hyundai and plaintiff In responding to this argument, the majority asserts that it is not "unfair to bind a manufacturer by the actions of a seller" (slip op. at 21). In support of this proposition, the majority points to *Wilbur v. Toyota Motor Sales, U.S.A.*, 86 F.3d 23 (2d Cir. 1996). *Wilbur* is clearly distinguishable from the case at bar.

The plaintiff in *Wilbur* sued Toyota Motor Sales (Toyota) for refusing to honor its new car warranty on her Toyota Camry. The plaintiff bought the car in May 1992 from Tri-Nordic Toyota (Tri-Nordic), which had used it as a demonstrator for several months prior to the sale. Before the plaintiff bought the car, Tri-Nordic told her that, during the time the car was being used as a demonstrator, it had been in an accident that required nearly $4,000 in repairs. However, Tri-Nordic told the plaintiff that the car had been fully repaired and had sustained no structural damage. At the time of the plaintiff's purchase of the car, the plaintiff received a copy of Toyota's warranty, which stated that the warranty went into effect "'on the date the vehicle is first delivered or

put into use (in-service date).'" *Wilbur*, 86 F.3d at 24-25. Tri-Nordic filled in the in-service date as "5/18/92," the date the plaintiff bought the car. The warranty also stated that "'repairs and adjustments required as a result of . . . accident . . . are not covered.'" *Wilbur*, 86 F.3d at 25. In June 1992 the plaintiff began experiencing problems with the car, but when she took it in for repairs, she was told that the repairs were excluded from coverage because the vehicle had sustained structural damage in an accident. Following the filing of the plaintiffs suit for breach of warranty, Toyota moved for summary judgment, and the motion was granted. A main issue on appeal was whether Toyota's warranty, with its accident exclusion, went into effect on the date that the plaintiff bought the car or on the date several months previously when it was delivered to Tri-Nordic. If it went into effect when the car was delivered to Tri-Nordic, this would mean that the warranty's exclusion for accidental damage applied from that date, and there was thus no warranty coverage for any repairs resulting from the accident. If, however, the warranty did not go into effect until the plaintiff bought the car, the accidental damages exclusion would not have taken effect until after the accident took place, and the repairs resulting from the accident *would* be covered. The Court of Appeals held that the warranty went into effect on the date the plaintiff bought the car. The court therefore reversed the grant of summary judgment in favor of Toyota. In reaching this conclusion, the court conceded that "it was the actions of Tri-Nordic, not Toyota, which resulted in the damage to the car that in turn led to this lawsuit." *Wilbur*, 86 F.3d at 27. However, the court added that Toyota "gave its dealer the authority to fill in the in-service date." *Wilbur*, 86 F.3d at 27. In other words, Toyota would not have been vulnerable to the suit arising from the accident if Tri-Nordic had not filled in the "5/18/92" in-service date on the warranty, which was an action that Toyota had authorized Tri-Nordic to take. The court concluded that the plaintiff's

breach-of-warranty claim "cannot be defeated on Toyota's motion for summary judgment and must be allowed to proceed to trial." *Wilbur*, 86 F.3d at 27.

While it was Tri-Nordic's actions that led to the accident in *Wilbur*, this accident was problematic for Toyota only because of the in-service date that Tri-Nordic filled in on the warranty. As noted, Toyota had authorized Tri-Nordic to fill in this date. In the case at bar, on the contrary, any error on the part of Gartner in failing to include the warranty in the sales contract was not authorized by Hyundai.

With regard to whether a manufacturer may be bound by the actions of a seller, the most that can be concluded from *Wilbur* is that, where the warrantor *authorized* the actions of the seller, the warrantor's disclaimer may be held unenforceable. However, *Wilbur* has no application to the case at bar, where any error on the part of the seller in failing to include the warranty in the purchase contract clearly was *not* authorized by Hyundai. The majority's reliance on *Wilbur* is misplaced.

In sum, I disagree with the majority's unconscionability determination for several reasons. Under the majority's novel holding, which represents a dramatic change in state contract law, manufacturers now face an impossible hurdle in attempting to ensure that their warranty exclusions are enforceable. A possible result is that manufacturers will conclude it is no longer cost-effective to offer written warranties. This result, as noted, would be decidedly anticonsumer. Moreover, in holding Hyundai responsible for failing to make its warranty available to plaintiff at the time she signed the purchase contract, the majority directly contradicts the relevant FTC regulations, particularly section 702.3, which provides that it is the *seller's* responsibility to make the warranty available to the purchaser at the point of sale. In addition, by raising an argument, *sua sponte*, on behalf of plaintiff but declining, at the same time, to consider, *sua sponte*, an argument on behalf

of Hyundai, the majority sends an unfortunate message regarding the fairness of this court's approach to arguments raised on behalf of parties who appear before us.

Because of my disagreement with the majority on these points, I respectfully dissent from the modification of the opinion upon denial of rehearing. It is my belief that this court could benefit from briefing on these matters. I note, too, that this court allows successive petitions for rehearing where a majority opinion has been modified upon denial of rehearing. In light of the extensive modifications made by the majority here, I suggest the filing of such a petition. For the foregoing reasons, I vote to grant Hyundai's petition for rehearing.

APPENDIX D

[LOGO]

SUPREME COURT OF ILLINOIS
SUPREME COURT BUILDING
SPRINGFIELD 62701

September 25, 2006

JULEANN HORNYAK
CLERK OF THE COURT
(217) 782-2035

TELECOMMUNICATIONS DEVICE
FOR THE DEAF
(217) 524-8132

FIRST DISTRICT OFFICE
20TH FLOOR
160 N. LASALLE ST.
CHICAGO 60601
(312) 793-1332

TELECOMMUNICATIONS DEVICE
FOR THE DEAF
(312) 793-6185

Ms. Denean K. Sturino
FagelHaber LLC
55 East Monroe Street, 40th Floor
Chicago, IL 60602

Re: No. 98813—*Shante Razor, appellee, v. Hyundai Motor America, appellant.*

Dear Ms. Sturino:

The Supreme Court today DISMISSED the petition for rehearing in the above-entitled cause.

Burke, J., took no part.

The mandate of this Court shall issue on October 30, 2006.

Very truly yours,

/s/ Juleann Hornyak
Clerk of the Supreme Court

cc: Mr. Hugh S. Balsam
Mr. Scott M. Cohen
Mr. Bradley B. Falkof
Ms. Amy R. Miller

APPENDIX E

IN THE SUPREME COURT OF ILLINOIS

No. 98813

SHANTE RAZOR,
Plaintiff-Appellee,

v.

HYUNDAI MOTOR AMERICA,
Defendant-Appellant.

On Appeal of Defendant-Appellant, Hyundai Motor America, from the Appellate Court of Illinois, First Judicial District, No. 1-03-1359. There Heard on Appeal from the Circuit Court of Cook County, Illinois, Municipal Department, First District, No. 01 M1 163043. The Honorable Raymond J. Funderburk, Judge Presiding.

HYUNDAI MOTOR AMERICA'S
PETITION FOR REHEARING

POINTS AND AUTHORITIES

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CONCLUSION 18

To the Honorable Justices of the Supreme Court:

Pursuant to Illinois Supreme Court Rule 367, Appellant, Hyundai Motor America ("Hyundai"), respectfully petitions this Court for rehearing of Sections I(B) and II of its opinion dated February 2, 2006 ("Opinion," attached hereto as Appendix 1) based on the following mistakes of fact and law that materially affected its decision:

- It was a material mistake of fact to rely on the Retail Installment Contract between Razor and the non-party seller, Gartner Buick, as a basis for the Court's unconscionability analysis of Hyundai's limited warranty. Hyundai was not a party to the Retail Installment Contract.
- It was a material mistake of fact to consider Hyundai the "seller." Hyundai was not the "seller" of the Sonata and had no involvement in the sale of the Sonata to Razor. To the contrary, Hyundai was the "warrantor" that provided the limited written warranty of repair or replacement with the vehicle.
- It was a material mistake of law to use a one-factor, *per se* test for the unconscionability analysis of exclusions and disclaimers in limited warranties of repair or replacement.
- It was a material mistake of fact to find that the trial judge had precluded Razor from laying the foundation to testify as to diminution in value damages. To the contrary, Razor's counsel admittedly declined to question Razor about any purported diminution in value.

INTRODUCTION

The Court undertook an unconscionability analysis that was never advanced by the parties, and in doing so, overlooked some critical points. For example, throughout the Opinion, the Court refers to Hyundai as the "seller," when in

actuality, the seller was Gartner Buick, a third-party automobile dealer. Hyundai, which was the warrantor, was not a party to the Retail Installment Contract between the Appellee, Shante Razor ("Razor"), and Gartner Buick, and Razor did not claim (and could not claim) that Hyundai breached that contract. Nevertheless, the Court based its unconscionability analysis on the Retail Installment Contract, instead of the limited warranty of repair and replacement that accompanied the product. The unconscionability analysis, however, must be limited to Hyundai's limited warranty and the unique circumstances of repair and replacement warranties offered by product manufacturers or distributors who are not sellers. The effect of this Court's decision could be tremendous, and impact all manufacturers of goods sold in Illinois. If this petition is not granted, the vast majority of the exclusions, disclaimers and limitations contained within warranties provided by these manufacturers are, on their face, and without analysis, unconscionable without any remedy for the manufacturers to show their validity. This is the holding, however inadvertent, that judges, lawyers and legal scholars are taking from this Court's decision.

Additionally, this Court's unconscionability analysis was unwarranted to begin with. Not only did Razor never allege, or seek a hearing on, the purported unconscionability of the exclusion, she never advanced an argument that considered all the necessary factors of unconscionability. As such, Hyundai never has had an opportunity to refute any claims of purported unconscionability.

Further, the Court's unconscionability analysis is incomplete insofar as it fails to consider the concept of substantive unconscionability. In short, Hyundai's consequential damages exclusion was found to be unconscionable without pleading, proof or basis in fact or law.

Finally, because the trial court, in fact, did not preclude Razor's attorney from attempting to lay the foundation for

Razor's testimony of warranty damages, there was no error. Therefore, the case should not be remanded.

FACTS PERTINENT TO REHEARING

Razor buys Hyundai Sonata, receives limited warranty excluding coverage for consequential damages.

Razor bought the Hyundai Sonata in question from Gartner Buick, Inc. (S.R. V2, 37; R. V1, C154).[1] The Retail Installment Contract she entered into was with Gartner Buick, a non-party to this case. (R. V1, C14-15). Hyundai was not a party to the Retail Installment Contract, and no evidence suggests that Hyundai had any influence or role in the formation of the Retail Installment Contract, or in the decision to place certain words in that contract.

At the time of her purchase, Razor received Hyundai's New Vehicle Limited Warranty. (S.R. V2, 44). The warranty, provided, in relevant part:

> WHAT IS COVERED
>
> Repair or replacement of any component originally manufactured or installed by Hyundai Motor Company or Hyundai Motor America (HMA) that is found to be defective in material or workmanship under normal use and maintenance, except any item specifically referred to in the section "What is Not Covered." * * *
>
> WHAT IS NOT COVERED
>
> * * *
>
> * INCIDENTAL OR CONSEQUENTIAL DAMAGES, INCLUDING WITHOUT LIMITATION, LOSS OF TIME, INCONVENIENCE, LOSS OF USE OF THE VEHICLE OR COMMERCIAL LOSS.

---

[1] Cites to "S.R." refer to the three-volume Supplemental Record. Cites to "R" refer to the three-volume Record on Appeal.

(R. V2, C362-64). Throughout the trial and appellate court proceedings, the parties have agreed that the only document at issue is Hyundai's limited warranty of repair and replacement.

Razor receives benefit of Hyundai's limited warranty.

Hyundai honored the limited warranty by repairing Razor's vehicle at no charge to her. (S.R. V2, 58, 63, 67, 72, 77-79). Razor had no problems with the vehicle after November 21, 2001, and by the time of trial in February 2003, the Sonata was problem-free, and Razor had driven the car some 20,000 miles. (S.R. V2, 100, 101, 121).

Razor sues Hyundai, but never alleges that the exclusion of consequential damages is unconscionable.

Although Razor's vehicle was repaired at no charge to her, she sued Hyundai for breach of warranty. (R. V 1, C3). In counts I, II, and III, she sought relief under the Magnuson Moss Warranty Act, 15 U.S.C. § 2301, *et seq.*, alleging breach of written warranty, breach of the implied warranty of merchantability, and revocation of acceptance. (R. V 1, C6-9). Razor's complaint did not allege that the exclusion of incidental and consequential damages was unconscionable, or that the limited warranty was unfair to her. (R. V1, C3-12).

Hyundai asserted several defenses to Razor's complaint, including its exclusion of incidental and consequential damages. (R. V 1, C 111-13). In her response to Hyundai's fifth affirmative defense (exclusion of consequential damages), Razor admitted that the exclusion of consequential damages existed in the limited warranty given by Hyundai, but made no assertions regarding its purported unconscionability. (R. V1, C90).

At trial, Razor never claims that the exclusion is unconscionable and there is no hearing on the matter.

During the February 2003 trial, counsel for Razor asked questions directly from the warranty, and Razor read part of the written warranty into the record at trial, purportedly to show that the warranty was a "basis for the bargain" that led Razor to buy the Sonata. (S.R. V2, 16; V2, 47-48; S.R. V2, 131). Razor did not testify that she was prevented from reading the warranty before she purchased the Sonata, or that she was unaware of any provisions of the warranty, or that she would not have bought the vehicle if she knew about the exclusion of consequential damages. Razor did, however, testify that she received the benefit of the warranty—repair of the vehicle at no charge to her. (S.R. V2, 126).

During trial, and over Hyundai's objection, the trial judge told the jury that it could award consequential damages "if the plaintiff demonstrates that the warranty fails of its [essential] purpose." (S.R. V2, 194-95; S.R. V3, 46-47). Although the trial court stated, in connection with this ruling, that Hyundai's exclusion of consequential damages was unconscionable, Razor had never introduced evidence specifically related to the elements of unconscionability under Illinois law. In determining that Hyundai's exclusion was unconscionable, the trial court relied solely on the alleged breach of the limited warranty. (S.R. V2, 195).

Razor declines opportunity to offer diminution-of-value testimony at trial.

During the trial, Razor was the only witness in her case-in-chief. An issue arose as to Razor's competence to testify as to the alleged diminished value of the Sonata. After an extensive sidebar, the trial judge ruled that Razor could testify about her own personal feelings. (S.R. V2, 93). During this sidebar, Razor's counsel elected to not have Razor testify as to her specific opinion of the diminution in value of the Sonata:

THE COURT: Her testimony is going to be and she is going to be examined to the extent of what it is she would or would not have done in connection with the purchase of the vehicle as opposed to testifying to the diminished value of the vehicle. Am I understanding that to be correct, Counsel?

[Razor's counsel]: Correct. Correct.

(S.R. V2, 92) (emphasis added). After Razor's counsel's clarification, the trial judge overruled Hyundai's original objection seeking to bar Razor's foundation evidence relating to her prior experience with vehicle valuation. (S.R. V2, 91-92).

THE OPINION

In accordance with Hyundai's arguments, and in the first eighteen pages of the Opinion, this Court held that plaintiffs in Illinois seeking to negate operation of an exclusion of consequential or incidental damages must prove, as a separate proposition from the "failure of essential purpose" determination, that the exclusion is unconscionable. (App. 1, 7-18). The question of whether to apply the independent or dependent approach was the focal point of the arguments made by both Hyundai and Razor in their briefs.

The Court then proceeded, in three pages making up Section I(B) of the Opinion, to perform a cursory unconscionability analysis, that mistook some facts, and held that a one-factor test for unconscionability may be performed by judges to reach the conclusion that an exclusion in a limited warranty is unconscionable. The Court held that, even in combination, the following facts did not render Hyundai's exclusion unconscionable: 1) the contract was on a pre-printed form; 2) there was a difference in bargaining power between the parties; and 3) the exclusion at issue limited Hyundai's liability. (App. 1, 19). Despite that analysis, this

Court went on to hold that one factor—that Razor did not see, or could not have seen the exclusion before her purchase—apparently alone made Hyundai's exclusion unconscionable. (App. 1, 20). No other factors were considered in the analysis.

Merely using this one-factor test for determining a finding of unconscionability supports the Court's misconceptions that the contract to be interpreted in this case was the two-page Retail Installment Contract between Razor and Gartner Buick, instead of Hyundai's written warranty and that Hyundai was the "seller." This is seen in the following quotes from the Opinion:

- "That is the lack of evidence that the disclaimer of consequential damages was present within the written contract itself."
- ". . . the portion of the written contract which was admitted into evidence makes no reference to the terms, and neither party now objects to the circuit court's ruling admitting the contract into evidence."
- "Although the contract does mention provisions on the back of the page, the back of the page does not appear in the record before us."
- ". . . defendants produced no evidence that the clause is present or even referred to in the written contract which plaintiff signed."
- ". . . in a form contract drafted by the seller." (App. 1, 19-21) (emphasis added).

ARGUMENT

I. The Court has mistaken the parties and the warranty in its unconscionability analysis.

The Court overlooked the fact that, in this case, Hyundai was the warrantor and the seller was Gartner Buick. Razor did not enter into any written contract with Hyundai, and the

only document that Hyundai allegedly breached was the limited written warranty. (R. V1, C3-11). The Court's references to Hyundai as the "seller" and the location of the exclusion in the "written contract" are both factually incorrect.

A. The only "contract" at issue is Hyundai's limited warranty.

The Court rested its unconscionability determination on an argument—that was not advanced by Razor at any stage of these proceedings—that the consequential damage exclusion was not in Razor's Retail Installment Contract. This conclusion creates a factual impossibility for Hyundai (and all product warrantors who are not retailers).

Hyundai is not a party to the Retail Installment Contract. (R. V1, C14-15). There is no testimony that Hyundai had, or has, control over Gartner Buick, the language of the Retail Installment Contract, or the sales transaction between Gartner Buick and Razor.[2] The only relevant contract (or agreement) in this case is Hyundai's limited written warranty. (R. V1, C90). Therefore, this Court's holding that the consequential damages exclusion in Hyundai's limited warranty is unconscionable because it is not included in the Retail Installment Contract is based on a material mistake of fact, because it rests on the incorrect assumption that Hyundai could interject terms into the Retail Installment Contract.

The Court's error in this regard has widespread ramifications. Many consumer-product transactions, including the sale of vehicles, computers, appliances, electronics, furniture, and machinery, are affected by this decision, because they involve warrantors who are not retail, end-user sellers. In all those scenarios, the exclusions contained in the limited written

---

[2] It must further be recognized that there is no vertical privity between Razor and Hyundai.

warranties offered by the manufacturer or distributor will be considered unconscionable unless the warrantor finds some way to intervene and interject warranty terms in the retailer's sale of the product. The impact of this Court's misapplication of the facts is therefore far-reaching, and should be reexamined.

B. Hyundai is the "warrantor" of Razor's Sonata, not the "seller."

Throughout the Opinion, the Court interchangeably and incorrectly referred to Hyundai as both the warrantor and the "seller," without regard to the very different roles that the two parties had in Razor's sales transaction. This approach is not only mistaken, it is improper under the Magnuson Moss Act.

The Magnuson Moss Warranty Act (the "Act"), under which Razor's claims were brought, defines the "warrantor" as "any supplier or other person who gives or offers to give a written warranty or who is or may be obligated under an implied warranty." 15 U.S.C. § 2301(5). The Act provides that "warrantors" have specific requirements pertaining to what must be placed in every written warranty:

> In order to improve the adequacy of information available to consumers, prevent deception, and improve competition in the marketing of consumer products, any warrantor warranting a consumer product to a consumer by means of a written warranty shall, to the extent required by rules of the Commission, fully and conspicuously disclose in simple and readily understood language the terms and conditions of such warranty. Such rules may require inclusion in the written warranty of any of the following items among others: . . . (6) Exceptions and exclusions from the terms of the warranty. . . .

15 U.S.C. § 2302 (emphasis added). Nothing in the Act states that warrantors must include warranty exceptions or exclu-

sions in a distinctly different document—the purchase contract.

By holding that exclusions are unconscionable when not presented to consumers before the purchase, this Court places a requirement on warrantors that the Act does not. In fact, the Act specifically states that the Federal Trade Commission ("FTC") is the only party that can ". . . prescribe rules requiring that the terms of any written warranty on a consumer product be made available to the consumer (or prospective consumer) prior to the sale of the product to him." 15 U.S.C. § 1502. The rules proscribed by the FTC pertaining to the Act are codified at 16 C.F.R. § 700, *et seq.*, and, those rules provide only that the written warranty be "conveyed at the time of sale of the consumer product." 16 C.F.R. § 700.11(b) (emphasis added). The rules do not require that the warranty, or any part of it, be made available to a consumer before the purchase of the product, as this Court has done. By providing the limited warranty at the time Razor bought the Sonata, Hyundai complied with both the FTC Rules and the Act under which Razor brought her suit. (S.R. V2, 44).

Nor does the case relied on by this Court stand for the proposition that an exclusion must be presented to a consumer before a purchase. In *Frank's Maintenance,* the appellate court held that an exclusion, in order to be procedurally acceptable, need only be "bargained for, brought to the purchaser's attention *or* be conspicuous." *Frank's Maintenance & Engineering, Inc. v. C. A. Roberts Co.,* 86 Ill. App. 3d 980, 990 (1st Dist. 1980), *appeal denied,* 133 Ill. 2d 556 (1980) (emphasis added). As Hyundai argued in its opening brief, a provision written in bold letters is conspicuous under Illinois law. See *Sorce v. Naperville Jeep Eagle, Inc.,* 309 Ill. App. 3d 313, 325-26 (2nd Dist. 1999); 810 ILCS 5/1-201(10) (West 2005) ("Language in the body of a form is 'conspicuous' if it is in larger or other contrasting type or color.").

Hence, one of the ways for a warranty provision to be procedurally acceptable under the *Frank's Maintenance* holding - conspicuousness - was inarguably met.

The effect of the misconception of Hyundai's role in the sale of Razor's vehicle, and as to which document contained the consequential damage exclusion, is enormous and far-reaching. This misunderstanding could conceivably render all exclusions in outstanding warranties unconscionable even though the warrantor is not the seller, and has no control over the sales transaction involving its product. To require that exclusions be included in a completely separate document - a third-party purchase contract-prior to the purchase of the product, even where the warrantor had no role in the sale of the product, is a factual anomaly.

Already, in at least two instances, this Court's decision has been construed to stand for the proposition that exclusions in limited warranties are unconscionable merely because they are not included in a purchase contract. The first was at a mandatory arbitration hearing on February 15, 2006, in the case of *Juarez v. Hyundai Motor America,* 05 MI 123678, Circuit Court of Cook County. In the *Juarez* arbitration, counsel for the plaintiff (Krohn & Moss, Razor's counsel) reported to the arbitration panel that this Opinion provided a *per se* rule that warranty exclusions are unconscionable if not contained in the retail installment contract and shown to consumers before the purchase of a product. (See Affidavit of Adam Toosley attached hereto as Appendix 2.) Further, in an article dated February 8, 2006, the Chicago Daily Law Bulletin stated that this Opinion stood for the proposition that the exclusion of incidental and consequential damages in Hyundai's limited warranty was unconscionable because it was not in the "written contract itself." (See February *8,* 2006 Chicago Daily Law Bulletin article attached hereto as Appendix 3.) Rehearing is necessary to clear this matter up, lest courts in this State read the decision as creating *a per se*

rule of unconscionability based on a document the warrantor has no control over.

Because this Court misconstrued the parties (the seller, Gartner Buick, and the warrantor, Hyundai) and mistook the documents at issue (the purchase contract entered into by Gartner Buick and the warranty issued by Hyundai), and because Hyundai clearly followed the FTC Rules, this Court should revisit its decision regarding unconscionability and grant rehearing on the issue. The material errors of both fact and law should be corrected.

II. The Court erred in law by failing to include the necessary factors in its unconscionability analysis.

Razor never requested a hearing on unconscionability at trial. Because no hearing was had on unconscionability, Razor offered no evidence that the exclusion was difficult to find, read, or understand such that she did not know she was agreeing to, *i.e.*, that it was procedurally unconscionable. And, this Court, in its decision, neglected an important fact in the unconscionability analysis: there are no allegations or evidence that the warranty was totally one-sided or oppressive to Razor. The Court's analysis of unconscionability should be reconsidered for this reason as well.

The burden was, and is, clearly on Razor, as the party asserting unconscionability of the exclusion of consequential damages, to produce sufficient evidence of the clause's unconscionability. *Zobrist v. Verizon Wireless*, 354 Ill. App. 3d 1139, 1149 (5th Dist. 2004) ("The burden of proving that the provision is unconscionable was upon the plaintiff."). And, prior to this decision, all of the recent and factually similar cases have held that before a clause in a document will not be enforced, it must be both procedurally and substantively unconscionable. *Kinkel v. Cingular Wireless, LLC*, 357 Ill. App. 3d 556, 562 (5th Dist. 2005) ("In order to be unconscionable, a contract provision must be both pro-

cedurally and substantively unconscionable."); *Zobrist,* 354 Ill. App. 3d at 1147 ("Unconscionability has two facets-one that is procedural and one that is substantive."); *Rosen v. SCIL, LLC.,* 343 Ill. App. 3d 1075 (1st Dist. 2003), *appeal denied,* 207 Ill. 2d 627 (2004) ("Before a contract or clause will not be enforced, it must be found to be both procedurally and substantively unconscionable."); *Basselen v. General Motors Corp.,* 341 Ill. App. 3d 278, 288 (2nd Dist. 2003) ("Both elements of unconscionability must be met before a contract or clause will not be enforced."). This Court, however, seems to have established *a per se* unconscionability test based only on the procedural analysis, and solely on one factor within that analysis, namely, whether the exclusion was available for the plaintiff's review before the purchase. Therefore, the decision is a departure from this line of cases.

A procedural unconscionability analysis asks the question, "how did the provision get into the contract?" *Basselen,* 341 Ill. App. 3d at 288. While deciding procedural unconscionability, "consideration is given to the unfair surprise and relative bargaining strength of the parties." *Id.* However, a "take it or leave it" provision in a contract does not make it procedurally unconscionable without a showing of "[f]raud or other similar wrongdoing in the procurement of the agreement." *Zobrist,* 354 Ill. App. 3d at 1148. Conversely, a substantive unconscionability analysis asks whether the terms of the agreement, as a whole, are "grossly one-sided." *Id.; Streams Sports Club, Ltd. v. Richmond,* 99 Ill. 2d 182, 191 (1983) ("A contract is unconscionable when it is improvident, oppressive, or totally one-sided."). A clause in an agreement will not be found to be substantively unconscionable unless the agreement is not "otherwise supported by mutual consideration." *Zobrist,* 354 Ill. App. 3d at 1149.

Hyundai is perplexed by the six paragraphs in the Opinion that find its consequential damage exclusion unconscionable, because Section I(A) of the Opinion appears to appreciate the

importance of performing an unconscionability analysis not limited to one, end-all, be-all factor. Page 17 of the Opinion provides that "the unconscionability determination is not restricted to the facts and circumstances in existence at the time the contract was entered into" and that courts should examine unconscionability "from the perspective of later events." (App. 1, 17, citing *Pierce v. Catalina Yachts*, 2 P.3d 618, 623 (Alaska 2000)). The Opinion even references section 2-719(3) of the Uniform Commercial Code, which provides that matters that become known subsequent to the drafting of the contract are relevant to the unconscionability analysis. (App. 1, 17, citing 810 ILCS 5/2-719(3) (West 2000). Despite the *Pierce* holding and the wording of Section 719(3) of the Uniform Commercial Code, the unconscionability analysis in Section I(B) of the Opinion was limited to one factor, and did not take into account events that transpired during the sale (Razor received the warranty) or after the sale (Razor received the benefits of the warranty—repair at no charge to her and the availability and award of warranty damages).

Other recent decisions of the appellate court have held that exclusions, like the one here, are not unconscionable even if the plaintiff does not look at them before purchase. First, in *Sorce v. Naperville Jeep Eagle, Inc.*, the appellate court held that a warranty provision excluding consequential and incidental damages was not unconscionable and "more than met" the requirements of the Uniform Commercial Code by the sole fact that the exclusion (which was virtually identical to the exclusion in Hyundai's warranty that was given to Razor) was in capital letters somewhere in the warranty. *Sorce*, 309 Ill. App. 3d at 325. In the second case, *Basselin v. General Motors, Corp.*, the exclusions were not shown to the plaintiffs "until after they signed the retail installment contract." *Basselin*, 341 Ill. App. 3d at 288. The *Basselin* court held that this fact may arguably have met the procedural aspect of unconscionability, but without an attempt to plead

and prove the substantive prong of unconscionability, the exclusion would not be invalidated. *Id.* The *Basselin* court went on to further say that the plaintiffs would not have been able to prove substantive unconscionability because they still received monetary damages as a direct result of the defendant's breach of the warranty. *Id.* at 289.

In this case, Razor never presented any evidence of the traditional unconscionability factors. The trial court did not find, and the evidence did not show, any of the prerequisites for a finding of procedural unconscionability. There were no allegations or evidence that Razor was unable to read the exclusion. There were no allegations or evidence that she could not find the exclusion. There were no allegations or evidence that she was precluded from reading the warranty or the exclusion. There were no allegations or evidence that she was taken advantage of by Hyundai. There were no allegations or evidence that she was unfairly surprised by the consequential damages exclusion. On the contrary, the exclusion was conspicuously written in plain, simple, understandable language, and in all capital letters.

Further, Razor, as the party with the burden of proof, provided no evidence that the limited warranty containing the consequential damages exclusion is so one-sided that no person in her right mind would enter into it. Such a finding would be inconsistent with the evidence in any event, for it was undisputed that: Razor had a problem with her vehicle, it was repaired under the warranty at no cost to her, and she was entitled to pursue damages for breach of the warranty. There is no argument that can be made that Hyundai's warranty was substantively unconscionable, as she was afforded mutual consideration under the warranty. Because Razor chose not to allege the exclusion's unconscionability, or to produce any evidence of this at trial, there can be no award of consequential or incidental damages.

Most importantly, it is unclear whether the Court's Opinion stands for the following propositions: (1) substantive unconscionability does not have to be proved; (2) cases like *Sorce* and *Basselin* are now overruled; and (3) a one-factor, *per se* unconscionability analysis can be performed to invalidate exclusions in limited warranties. These issues were never addressed or even contemplated by the parties or the courts below. If this Opinion can be construed to afford such sweeping changes in Illinois law, it should not be done without briefing by the parties and the opportunity for numerous other interested parties (non-retailer warrantors) to weigh in. Certainly, these issues are important and wide-reaching enough to necessitate rehearing.

III. The Court erred in fact by assuming that Hyundai has been given a reasonable opportunity to present evidence on the validity of its exclusion.

The Court appears to rest its decision on unconscionability on a further material misunderstanding of the facts. Despite the ruling of the trial court, there has never been a need to conduct a thorough unconscionability analysis. First, and foremost, Razor did not even allege unconscionability of the exclusion in her Complaint or her reply to Hyundai's affirmative defenses. (R. V1, C3-11, C90). And, Razor's failure to allege or produce evidence of unconscionability at trial should have resulted in this Court's declining to address the issue, because it was waived by Razor. *Pierson v. Dean, Witter, Reynolds,* 742 F.2d 334, 339 (7th Cir. 1984) (applying Illinois law) ("We decline to hold the arbitration provision unconscionable without the support of any evidence beyond mere allegations of unfairness contained in an appellate brief."); *see also Man Roland, Inc. v. Quantum Color Corp.,* 57 F. Supp. 2d 568, 576 (N.D. Ill. 1999) (applying Illinois law) (failure to allege facts supporting unconscionability in the complaint and alleging unconscionability for the first time

in response to a motion to dismiss is insufficient to support a finding of unconscionability).

As stated throughout, the trial court did not do a thorough, or proper, unconscionability analysis, but instead rested its unconscionability decision solely on irrelevant facts: the number of attempts it took to fix the car and Razor's loss of use of the car. Because those facts deal with the question of "failure of essential purpose" under a dependent approach analysis, Hyundai did not press the issue of unconscionability at trial—especially when Razor did not request an unconscionability hearing. Hyundai was, and is, not required to anticipate arguments not made by Razor, the party with the burden of proof. Illinois law is clear that a reviewing court "should not consider different theories or new questions not raised in the trial court if they might have been refuted or overcome had they been presented below." *Geaslen v. Berkson, Gorov & Levin, Ltd.*, 155 Ill. 2d 223, 230 (1993), *citing Hux v. Raben*, 38 Ill. 2d 223, 225 (1967). And, as the *Geaslen* decision held, the reviewing court "should take care that litigants are not deprived of an opportunity to present argument." *Id* Clearly, no argument can be made that Hyundai has been given a reasonable opportunity to refute procedural or substantive unconscionability, and without this, the Court's determination should be revisited.

The rule stated in *Gleason* has been applied in cases concerning the Uniform Commercial Code. In the *Frank's Maintenance* case cited by this Court, the appellate court held that before making an unconscionability determination as to a provision of a contract, the court "must give the parties a reasonable opportunity to present evidence as to its commercial setting, purpose and effect." *Frank's Maintenance*, 86 Ill. App. 3d at 989. "Generally a full hearing on the issue is required." *Id.* In fact, the Uniform Commercial Code itself provides that parties must be given a reasonable opportunity to produce evidence regarding allegedly unconscionable con-

tract provisions. 810 ILCS 5/2-302 (West 2005). Despite the provisions of the Uniform Commercial Code, the holding in *Frank's Maintenance* and this Court's holding in *Geaslen,* Hyundai has been deprived of its right to present evidence as to the validity of its exclusion.

As a result of this Opinion, to date, the only party that has been held to any standard or burden of proof regarding the validity of the exclusion in the limited warranty has been Hyundai. This is not Hyundai's burden. Thus, according to the Opinion, it would appear that the new law in Illinois is that plaintiffs: 1) need not allege unconscionability; 2) need not request a hearing on unconscionability; 3) need not show that the limited warranty was one-sided; and 4) need not put forth any evidence of unconscionability other than the fact that they did not receive the limited warranty prior to signing the Retail Installment Contract. This Court, whether intentionally or not, has shifted the burden of proof to Hyundai (and all warrantors) to not only anticipate the facts that this Court thought were relevant, but to refute an analysis that had not been done in the pleadings, the trial court or the appellate court. This surely could not have been the Court's intention. Razor (not Hyundai) needed to plead and prove unconscionability, and her failure to do so warrants rehearing and reversal of the consequential damage award.

IV. The Court erred in fact when it found that the trial judge prohibited Razor's attorney from laying the foundation for testifying as to warranty damages.

In the Opinion, the Court states the following:

> During plaintiffs case in chief, the circuit court precluded plaintiff's counsel from asking plaintiff how much she would have paid for the car if she had known of the defects. This was error, and it was only because of this error that plaintiff failed to prove damages...It is true that there must be an adequate showing of the basis for

> such testimony before it will be allowed (citation), but in this case, the circuit court sustained defense counsel's objection while plaintiff's counsel was attempting to establish the foundation of plaintiffs knowledge as to the value of the vehicle.

(App. 1, 23). This description, however, does not accurately reflect what happened at the trial, and is grounds for this Court's rehearing of Section II of the Opinion.

At trial, and following a lengthy sidebar regarding Razor's testimony on damages, the judge overruled defense counsel's objection regarding her testimony pertaining to a prior vehicle purchase, *i.e.*, foundation as to valuation. During that sidebar, however, Razor's attorney specifically admitted that Razor was not going to testify as to the diminished value of her car (S.R. V2, 92).

After the sidebar, Razor's counsel was able to ask her about her prior purchase of a car at an auction. (S.R. V2, 94). She also testified that she decided how much to bid on that car by looking at the history of the car. (S.R. V2, 94-95). She was then able to testify that she would not purchase the Sonata again today if given a chance. (S.R. V2, 97). Then, after the judge overruled Hyundai's objection, Razor was able to testify that she would not agree to pay the price she paid for the vehicle today. (S.R. V2, 96-97). Razor's counsel *never asked her to quantify the amount that she would have paid* in accordance the conversation had with the judge during the sidebar. The trial judge did not preclude Razor's attorneys from presenting a number for diminution in value damages; rather, Razor's attorneys made the conscious decision not to have her present that testimony. Because of this, and in accordance with the reasoning in the Opinion, this matter should not be remanded to the circuit court, and the award of diminution of value damages should be revisited.

CONCLUSION

Hyundai's Petition for Rehearing should be granted. First, this Court's Opinion is based on fundamental mistakes of facts, i.e., that Hyundai was the seller of Razor's Sonata or that Hyundai was either a party to, or had any input in, Razor's sale transaction or the Retail Installment Contract.[3] As a result, manufacturers who distribute products in Illinois, and who warrant those products, are now faced with a finding that the terms of their warranties are *per se* unconscionable based solely on one factor they cannot control. Second, this Court's decision to depart from long-standing Illinois law on the performance of an unconscionability analysis should be revisited. And, finally, the Court based its decision to remand on another material mistake of fact: that the trial judge precluded Razor's attorney from attempting to lay the foundation to testify to diminution in value damages.

For all of the reasons stated above, Hyundai respectfully requests this Court grant its Petition for Rehearing. If the Court would deem it beneficial, counsel for Hyundai would be pleased to reargue the issues presented in light of the arguments made within this petition.

Respectfully submitted,

HYUNDAI MOTOR AMERICA

By: /s/ Denean K. Sturino
One of its Attorneys

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[3] Perhaps the factual mistakes mentioned throughout this petition may be attributed to the fact that the author of the Court's Opinion was not present at the oral argument on November 16, 2005. (App. 2). Although Hyundai understands that a Justice need not be present to participate in a decision, in this case, the mistakes may have been cleared up by questioning at oral argument. Additionally, and for that reason, a rehearing is appropriate.

Denean K. Sturino
FAGELHABER, LLC
55 E. Monroe St., 40th Floor
Chicago, Illinois 60603
(312)346-7500

Hugh C. Griffin
Hugh S. Balsam
LORD, BISSELL & BROOK LLP
111 S. Wacker Drive
Chicago, Illinois 60606
(312)443-0700

February 23, 2006

APPENDIX F

IN THE SUPREME COURT OF ILLINOIS

No. 98813

SHANTE RAZOR,
Plaintiff-Appellee,

v.

HYUNDAI MOTOR AMERICA,
Defendant-Appellant.

On Appeal of Defendant-Appellant, Hyundai Motor America, from the Appellate Court of Illinois, First Judicial District, No. 1-03-1359. There Heard on Appeal from the Circuit Court of Cook County, Illinois, Municipal Department, First District, No. 01 M1 163043. The Honorable Raymond J. Funderburk, Judge Presiding.

HYUNDAI MOTOR AMERICA'S
PETITION FOR REHEARING
OF JUNE 29, 2006 OPINION

To the Honorable Justices of the Supreme Court:

Under Illinois Supreme Court Rule 367, Appellant, Hyundai Motor America ("Hyundai"), respectfully petitions the Court for rehearing of its modified opinion dated June 29, 2006 (attached hereto as Appendix 1) based on the following mistakes of law that materially affected the Court's decision:

- It was a material mistake of law to ignore an FTC regulation directly on point and place requirements on remote warrantors that federal law does not.

- It was a material mistake of law to find that Hyundai waived arguments pertaining to the different duties of the seller and warrantor under the Magnuson Moss Act.

INTRODUCTION

This Court's modified opinion resulting from Hyundai's petition for rehearing raises a new issue of federal preemption not ever contemplated in the trial court, appellate court, or this Court before its *sua sponte* consideration of the propriety of Hyundai's warranty disclaimers and exclusions. Specifically, in the modified opinion, the Court has created a higher and different standard for the distribution of warranties than is required under the Magnuson Moss Act and the federal regulations. This is an important issue of statewide and national significance-the interpretation and preemptive nature of the Magnuson Moss Act and the federal regulatory laws implementing it.

Inarguably, Hyundai placed the limited repair and replacement warranty in Razor's vehicle, and that warranty was in the vehicle upon delivery to the dealership. Under the applicable Federal Trade Commission ("FTC") regulations, *Hyundai's role in the delivery of the warranty under the Magnuson Moss Act ended at that point.*

However, the majority's imposition of a rule of law requiring warrantors to personally present the warranty to the consumer in order to rely on the terms (exclusions) of the warranty subverts the Magnuson Moss Act and the FTC regulations, which clearly provide that the *seller* is responsible for delivery of the warranty to the consumer. Consequently, this Court, perhaps inadvertently, has created, via its modified opinion, a sharp divergence between Illinois contract law and federal law. As Justice McMorrow observed, this preemption issue warrants review in its own right. That review should be in this proceeding, so as to avoid an influx

of incorrect decisions and appeals in the other Magnuson Moss cases pending in Illinois.

As noted by Justice McMorrow, the effect of this Court's decision is tremendous, and impacts all warrantors of goods sold in Illinois. Further briefing on this issue is warranted before the law in Illinois displaces preemptive federal law.

FACTS PERTINENT TO THIS REHEARING

Razor buys Hyundai Sonata, receives limited warranty excluding coverage for consequential damages.

Razor bought the Hyundai Sonata in question from Gartner Buick, Inc.—which is not a party to this case. (S.R. V2, 37; R. V1, C154).[1] The Retail Installment Contract she entered into was with Gartner Buick. (R. V1, C14-15).

At the time of her purchase, Razor received Hyundai's New Vehicle Limited Warranty. (S.R. V2, 44). The warranty provided, in bold letters, that incidental and consequential damages were excluded. (R. V2, C362-64). Razor testified that she knew of the existence of Hyundai's limited warranty before she bought the subject Sonata. (S.R. V2, 45-46). Before she signed the Retail Installment Contract, Razor did not ask to see the warranty. (S.R. V2, 107).

Razor receives benefit of Hyundai's limited warranty.

Hyundai honored the limited warranty by repairing Razor's vehicle at no charge to her. (S.R. V2, 58, 63, 67, 72, 77-79). By the time of trial in February 2003, the Sonata had been problem-free for more than a year, and Razor had driven the car some 20,000 miles. (S.R. V2, 100, 101, 121).

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[1] Cites to "S.R." refer to the three-volume Supplemental Record. Cites to "R" refer to the three-volume Record on Appeal.

Razor sues Hyundai, but never alleges that the exclusion of consequential damages is unconscionable.

Although Razor's Sonata was repaired at no charge to her, she sued Hyundai for breach of warranty. (R. V1, C3). Her complaint sought relief under the Magnuson Moss Warranty Act, 15 U.S.C. § 2301, *et seq.*, alleging breach of written warranty, breach of the implied warranty of merchantability, and revocation of acceptance. (R. V1, C6-9). *Razor's complaint did not allege that the exclusion of incidental and consequential damages was unconscionable, or that the limited warranty was unfair to her.* (R. V1, C3-12). Hyundai raised the issue of its exclusion as an affirmative defense in its answer. (R. V1, C111-13).

At trial, Razor never claims that the exclusion is unconscionable and there is no hearing on the matter.

During the February 2003 trial, counsel for Razor asked questions directly from the warranty, and Razor read part of the written warranty into the record at trial, purportedly to show that the warranty was a "basis for the bargain" that led Razor to buy the Sonata. (S.R. V2, 16; V2, 47-48; S.R. V2, 131). Razor did not testify that she was prevented from reading the warranty before she bought the Sonata, that she was unaware of any provisions of the warranty, or that she would not have bought the Sonata if she knew about the exclusion of consequential damages. Razor did, however, testify that she received the benefit of the warranty-repair of the Sonata at no charge to her. (S.R. V2, 126).

During trial, and over Hyundai's objection, the trial judge told the jury that it could award consequential damages "if the plaintiff demonstrates that the warranty fails of its [essential] purpose." (S.R. V2, 194-95; S.R. V3, 46-47). Although the trial court stated, in connection with this ruling, that Hyundai's exclusion of consequential damages was unconscionable, Razor had never introduced evidence on any of the ele-

ments of unconscionability under Illinois law, and the judge incorrectly relied solely on the alleged breach of the limited warranty. (S.R. V2, 195).

THE FEBRUARY 2, 2006 OPINION

This Court's initial opinion was released on February 2, 2006. In accordance with Hyundai's arguments, in the first part of the February 2, 2006 opinion, the Court held that plaintiffs in Illinois seeking to negate operation of an exclusion of consequential or incidental damages must prove, as a separate proposition from the "failure of essential purpose" determination, that the exclusion is unconscionable (the "independent approach"). The question of whether to apply the independent or dependent approach was the issue upon which review was granted, and thus was the focal point of the arguments made by both Hyundai and Razor in their briefs.

Then, in Section I(B) of the opinion, the Court performed a *sua sponte* unconscionability analysis and held that one factor—that the warranty was not included in Razor's purchase contract that was shown to her—made the exclusion in the limited warranty unconscionable. No other factors were considered in the analysis.

THE JUNE 29, 2006 MODIFIED OPINION

Hyundai timely filed a petition for rehearing of the February 2, 2006 opinion. (See copy of Hyundai's Petition for Rehearing of February 2, 2006 Opinion attached hereto as Appendix 2). In that petition, Hyundai argued that:

- It was a material mistake of fact to rely on the Retail Installment Contract between Razor and the non-party seller, Gartner Buick, as a basis for the Court's unconscionability analysis of Hyundai's limited warranty. Hyundai was not a party to the Retail Installment Contract.

- It was a material mistake of fact to consider Hyundai the "seller." Hyundai was not the "seller" of the Sonata and had no involvement in the sale of the Sonata to Razor. To the contrary, Hyundai was the "warrantor" that provided the limited
- written warranty of repair or replacement with the vehicle upon distribution to the seller.
- It was a material mistake of law to use a one-factor, per se test to determine the unconscionability analysis of exclusions and disclaimers in limited warranties of repair or replacement.

(App. 2).

Further, Hyundai made the following points regarding the relationship between itself and Gartner Buick in Razor's sales transaction:

- Hyundai was the warrantor and the seller was Gartner Buick. Razor did not enter into any written contract with Hyundai. (R. V1, C3-11) (App. 2, p. 7).
- Hyundai is not a party to the Retail Installment Contract. (R. V1, C14-15). There is no testimony that Hyundai had, or has, control over Gartner Buick, over the language of the Retail Installment Contract, or over the sales transaction between Gartner Buick and Razor. (App. 2, p. 7).
- Many consumer-product transactions, including the sale of vehicles, computers, appliances, electronics, furniture, and machinery, are affected by this decision, because they involve warrantors who are not retail, end-user sellers. In all those scenarios, the exclusions contained in the limited written warranties offered by the manufacturer or distributor will be considered unconscionable unless the warrantor finds some way

to intervene and interject warranty terms in the retailer's sale of the product. (App. 2, p. 8).

- By holding that exclusions are unconscionable when not presented to consumers before the purchase, this Court places a requirement on warrantors that the Act does not. In fact, the Act specifically states that the FTC is the only party that can prescribe rules regarding the pre-sale availability of the warranty. The rules proscribed by the FTC pertaining to the Act are codified at 16 C.F.R. § 700, *et seq.*, and those rules provide only that the written warranty be "conveyed at the time of sale of the consumer product." 16 C.F.R. § 700.11(b) (emphasis added). . . . By providing the limited warranty at the time Razor bought the Sonata, Hyundai complied with both the FTC regulations and the Act under which Razor brought her suit. (App. 2, p. 9).

Hyundai argued that the February 2, 2006 opinion should be reheard because the Court misconstrued the parties at issue, the documents at issue, and the roles in the sales transaction played by Razor, Gartner Buick, and Hyundai.

On June 29, 2006, this Court extensively modified Section I(B) of the February 2, 2006 opinion. The modified opinion acknowledged that Gartner Buick was the seller of Razor's vehicle, and that Hyundai was only the warrantor. But, then, in the modified opinion, the Court, for the first time in any known published case, established a new pre-sale disclosure rule that held that a warrantor's exclusions or limitations can be held unconscionable when they are not shown to the consumer before a purchase contract was signed, even when, in cases such as this, the warrantor had no role in the sales transaction and provided the warranty to the seller for distribution to the consumer. (App. 1). Although acknowledging that a federal regulation requires only that the warrantor provide the warranty to the seller under the Magnuson Moss

Act, the Court declined to give effect to the federal regulation "*sua sponte*" because the preemptive section of the C.F.R. was not specifically cited to. (App. 1).

In an opinion dissenting in part from the denial of the rehearing, Justice McMorrow disputed any waiver of the issue of the federal regulation due to a lack of citation, and stated that the Court was using "an overly technical application of the waiver doctrine." (App. 1). Noting that "this court allows successive petitions for rehearing where a majority opinion has been modified upon denial of rehearing," Justice McMorrow invited further briefing on the issues contained in her dissent. (App. 1).[2] Because of the statewide and national significance of this Court's amended holding, Hyundai submits this brief.

ARGUMENT

I. The divergence between Illinois contract law and the Federal Trade Commission regulations creates an issue worthy of rehearing

The June 29, 2006 opinion has, practically speaking, created a new rule of contract law to be applied in Illinois: If a non-selling warrantor does not present the warranty to the consumer before the consumer actually purchases the product, the exclusions and limitations contained within the warranty are unconscionable. The Court has placed a judicial requirement on non-selling warrantors that is not required by the Magnuson Moss Act and its preemptive federal regulations.

A. The pertinent provisions of the Magnuson Moss Act and regulations promulgated by the Federal Trade Commission

This case arises under the Magnuson Moss Act, which creates civil actions for consumers when suppliers or warran-

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[2] Justice McMorrow stated that it was her belief that the Court "could benefit from briefing on these matters." (App. 1).

tors have violated its provisions. 15 U.S.C. § 2310(d)(1). The Magnuson Moss Act provides that rules regarding the pre-sale availability of warranties and warranty terms be promulgated only by the FTC. 15 U.S.C. § 2302(b)(1)(A) ("The Commission shall prescribe rules requiring that the terms of any written warranty on a consumer product be made available to the consumer (or prospective consumer) prior to the sale of the product to him"). The rules promulgated by the FTC pertaining to the Magnuson Moss Act have preemptive effect in certain situations. *See American Financial Services Asso. v. FTC*, 247 U.S. App. D.C. 167 (D.C. Cir. 1985) ("The legislative history of the Magnuson-Moss Act and predecessor bills indicate that while Congress did not intend the Commission's regulations to 'occupy the field,' it did intend FTC rules to have that preemptive effect which flows naturally from a repugnancy between the Commission's valid enactments and state laws.").

In accordance with the power vested by section 2302 (b)(1)(A), the FTC promulgated rules regarding the pre-sale availability of warranty terms. On December 31, 1975, the FTC published in the Federal Register, Rule 702 (16 C.F.R. 702), which was amended on March 12, 1987, to provide sellers with greater flexibility in how to make warranty information available. Rule 702, as it was when Razor purchased the vehicle, and as it stands today, states:

> (a) Duties of seller. Except as provided in paragraphs (c) through (d) of this section, the seller of a consumer product with a written warranty shall make a text of the warranty readily available for examination by the prospective buyer by:
>
> (1) Displaying it in close proximity to the warranted product, or
>
> (2) Furnishing it upon request prior to sale and placing signs reasonably calculated to elicit the

prospective buyer's attention in prominent locations in the store or department advising such prospective buyers of the availability of warranties upon request.

(b) Duties of the warrantor. (1) A warrantor who gives a written warranty warranting to a consumer a consumer product actually costing the consumer more than $15.00 shall:

(i) Provide sellers with warranty materials necessary for such sellers to comply with the requirements set forth in paragraph (a) of this section, by the use of one or more by the following means:

(A) Providing a copy of the written warranty with every warranted consumer product; and/or

(B) Providing a tag, sign, sticker, label, decal or other attachment to the product, which contains the full text of the written warranty; and/or

(C) Printing on or otherwise attaching the text of the written warranty to the package, carton, or other container if that package, carton or other container is normally used for display purposes. If the warrantor elects this option a copy of the written warranty must also accompany the warranted product; and/or

(D) Providing a notice, sign, or poster disclosing the text of a consumer product warranty. If the warrantor elects this option, a copy of the written warranty must also accompany each warranted product.

16 C.F.R. 702.3 (emphasis added). The requirements of Rule 702 are two-fold: (1) sellers (not warrantors) must display the

warranty in close proximity to the product, or furnish it to the purchaser "on request" by the purchaser; and (2) warrantors must "provide materials to enable sellers to comply with the Rule's requirements." Notice of Final Action, 64 Fed. Reg. 19,700, 19,701 (Federal Trade Commission, Apr. 22, 1999). Under Rule 702.3, "a warrantor such as a manufacturer must provide a seller with warranty information in one of several alternative manners. The seller is then obligated to furnish the information to consumers." Thomas J. Holdych and Bruce D. Mann, *The Basis of the Bargain Requirement: A Market and Economic Based Analysis of Express Warranties—Getting What you Paid For and Paying For What You Get*, 45 DePaul L. Rev. 781, 857 n107 (1999). The "alternative manners" that a warrantor may use to furnish warranty information to sellers are: (1) providing warranty materials with every product (*i.e.*, in the glove box of every vehicle); (2) placing a warranty label on the product (i.e., the Monroney sticker on the window of the vehicle); (3) printing a warranty label on the box; or (4) providing a notice or sign disclosing the warranty. 16 C.F.R. 702.3(b).

The Magnuson Moss Act also provides that any state warranty law regarding pre-sale disclosure of warranty terms that is different from Rule 702.3 is not enforceable against warranties that comply with the Act:

(c) State warranty laws.

(1) Except as provided in subsection (b) and in paragraph (2) of this subsection, a State requirement—

(A) which relates to labeling or disclosure with respect to written warranties or performance thereunder;

(B) which is within the scope of an applicable requirement of sections 102, 103, and 104 [15 USCS §§ 2302, 2303, and 2304] (and rules implementing such sections), and

> (C) which is not identical to a requirement of section 102, 103, or 104 [15 U.S.C. § 2302, 2303, or 2304] (or a rule thereunder),
>
> shall not be applicable to written warranties complying with such sections (or rules thereunder).

15 U.S.C. § 2311(c)(1). The Rule also provides that before a warranty disclosure requirement that differs from the FTC regulations can become effective, the following must take place: (1) the state, via an appropriate agency, must apply to the FTC for allowance of such a requirement; and (2) the FTC must determine that the different requirement both affords protection to consumers greater than its requirements and does not unduly burdensome interstate commerce. 15 U.S.C. § 2311(c)(2).

The only case in the United States that has addressed the issue has held that if a warrantor plainly labeled the warranty "Limited Warranty," set forth the exclusions within the warranty, and provided the warranty to the seller (dealer) in compliance with 702.3, the exclusions are not invalid as to the warrantor simply because they were not disclosed to the purchaser before the sale. *Plagens v. Nat'l RV Holdings, Inc.*, 328 F. Supp. 2d 1068, 1076 (D. Ariz. 2004).

B. The Magnuson Moss Act and the FTC regulations preempt this Court's requirement that non-selling warrantors personally provide a copy of the warranty to consumers

By holding that warrantors' exclusions are unconscionable when not presented to consumers before purchase, the Court placed requirements on both sellers and warrantors that the Act and federal regulation does not. By virtue of this Court's June 29, 2006 opinion, a conflict between Illinois contract law (interpreting federal law) and preemptive federal law has arisen. Therefore, the Court's decision should be revisited by further briefing and argument on the issue.

1. The preemption doctrine in Illinois

The preemption doctrine is rooted in the supremacy clause of the Constitution, which mandates that "the Laws of the United States shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." *Orman v. Charles Schwab & Co.*, 179 Ill. 2d 282, 285 (1997), citing U.S. Const., art. VI, cl. 2. An act of Congress or regulatory law promulgated thereunder may supersede the statutory, regulatory, or common law of any state where that "[is] the clear and manifest purpose of Congress." *Orman*, 179 Ill. 2d at 285, quoting *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 120 L. Ed. 2d 407, 112 S. Ct. 2608 (1992) (internal citations omitted).

"There are three ways in which federal laws and statutes can preempt state law: (1) when the language of the federal statute expressly preempts state law ('express preemption'); (2) when the scope of the statute indicates Congress intended federal law to occupy the field exclusively (implied preemption'); or (3) when state law is in actual conflict with federal law (`conflict preemption')." *Van DerMolen v. Wash. Mut. Fin., Inc.*, 359 Ill. App. 3d 813, 818-819 (1st Dist. 2005), citing *Sprietsma v. Mercury Marine*, 537 U.S. 51, 154 L. Ed. 2d 466, 123 S. Ct. 518 (2002). Express preemption occurs "when Congress has considered the issue of pre-emption and has included in the enacted legislation a provision explicitly addressing that issue, and when that provision provides a `reliable indicium of congressional intent with respect to state authority,' 'there is no need to infer congressional intent to pre-empt state laws from the substantive provisions of the legislation.' *Busch v. Graphic Color Corp.*, 169 Ill. 2d 325, 335 (1996), quoting *Cipollone*, 505 U.S. at 517, 120 L. Ed. 2d at 423, 112 S. Ct. at 2618 (internal citations omitted). Conflict preemption may occur where it is "impossible for a private party to comply with both state and

federal requirements or where the state regulation stands as an obstacle to fully achieving the federal objective." *Resource Technology Corp. v. Illinois Commerce Comm'n*, 354 Ill. App. 3d 895, 900-01 (1st Dist. 2004), citing *Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293, 300, 99 L. Ed. 2d 316, 325, 108 S. Ct. 1145, 1150 (1988).

Federal regulations have no less pre-emptive effect than federal statutes. "Where Congress has directed an administrator to exercise his discretion, his judgments are subject to judicial review only to determine whether he has exceeded his statutory authority or acted arbitrarily." *Spitz v. Goldome Realty Credit Corp.*, 151 Ill. 2d 71, 75 (1992); *Fid. Fed. Sav. & Loan Ass'n v. De La Cuesta*, 458 U.S. 141, 153-154, 102 S. Ct. 3014, 73 L. Ed. 2d 664 (1982). In fact, the First District Appellate Court recently held that any finding that a defendant violated the Illinois Consumer Fraud Act pertaining to requirements regarding disclosures in credit-related documents would be preempted by the regulations propounded by Office of Thrift Supervision ("OTS"), a federal regulatory office, because the OTS was "given primary responsibility" to determine such requirements. *Van Der Molen*, 359 Ill. App. 3d at 819.

2. The Court's pre-sale disclosure rule is expressly preempted by the Magnuson Moss Act and the FTC regulations

Both cases that have addressed the preemption issue have held that all state laws pertaining to the labeling or disclosure of written warranties and their terms under the Magnuson Moss Act are expressly preempted. *See Motor Vehicle Mfrs. Ass'n v. Abrams*, 899 F.2d 1315, 1319 (2d Cir. 1990) (State requirements relating "to labeling or disclosure with respect to written warranties or performance thereunder" are preempted by the Act); *Chrysler Corp. v. Armstrong*, 1985 U.S. Dist. LEXIS 20247, *2 (D. Ky. Apr. 30, 1985) (Section 2311(c)(1) of the Magnuson Moss Act is an "express

preemption" section). *See also* Larry W. Kirby, *The Federal Consumer Warranty Act and Its Effect on State Law*, 43 Tenn. L. Rev. 429, 455 ("the FTC's disclosure rules preempt any state disclosure requirements that are within the scope of the rules and not identical to the rules' requirements."); 17 Am. Jur. 2d *Consumer Product Warranty Acts* § 13 (2006) ("Generally, any state law governing labeling or warranty disclosure or performance, which is within the scope of Magnuson-Moss Warranty Act sections and corresponding Federal Trade Commission regulations . . . and which is not the same as the federal requirements, is not applicable to consumer product warranties complying with those standards."). Further, federal court cases interpreting federal laws are controlling upon Illinois courts. *Busch v. Graphic Color Corp.*, 169 Ill. 2d at 335.

In two separate opinions issued shortly after the passage of the Magnuson Moss Act, the FTC held that state law requirements pertaining to disclosure of warranty terms that in any way differ from the FTC regulations are expressly preempted unless the state petitions the FTC for permission to enforce the different requirements. *See Preemptive Effect of Section 111(c)(1) of the Magnuson Moss Warranty Act*, 43 Fed. Reg. 50,737 (Oct. 31, 1978)(a copy of which is attached hereto as Appendix 3); *Applicability of Certain Provisions of California State Law; Final Findings and Determination*, 42 Fed. Reg. 54,004 (Oct. 4, 1977) (a copy of which is attached hereto as Appendix 4).

In its 1977 Opinion, the FTC provided that a state law can provide for different disclosure requirements for the providing of warranties to consumers only after the individual state has petitioned the FTC, and only after a full determination is made that the requirement both affords greater protection to consumers and does not unduly burden interstate commerce. 42 Fed. Reg. 54,004. The FTC also stated that, although state and federal consumer protection law is generally read har-

moniously, if the the state law frustrates the effectiveness of the federal law or when compliance with both laws is impossible, the laws conflict. *Id.* Further, as mentioned before, the FTC stated that if the following three elements are all met, the state requirement is preempted unless an application by the state is made: (1) the state requirement relates to "labeling or disclosure with respect to written warranties or performance thereunder"; (2) the state requirement is within the scope of section 102, 103, or 104, or "if it requires disclosure of terms in a written warranty in a manner different from the Federal rules"; and (3) the state requirement is different than the federal requirement. *Id.* at 54,005-54,006. In this decision, the FTC held that a California requirement that sellers display a notice stating the existence of a warranty and a sample copy of the warranty was invalid because it differed from the federal regulation and because the "extra burden" was not justified by the potential benefit to consumers. *Id.* at 54,008.

Here, all three elements of Section 2311(c)(1) are squarely met. First, the Court's new pre-sale disclosure rule applies to "labeling or disclosure" of warranty terms, as it provides that remote warrantors must provide a copy of the warranty to sellers before a purchase is consummated. Second, the pre-sale disclosure rule is within the scope of 2302 and requires disclosure of warranty terms in a manner different than federal law. And third, the pre-sale disclosure rule is different than 16 C.F.R. 702.3 in that warrantors must now perform a task other than just making the warranty available to the seller. Without an application to the FTC by the State of Illinois under 15 U.S.C. § 2311(c)(2), and a determination as to whether the different requirements unduly burden interstate commerce or benefit consumers, the Court's newly established requirements are preempted.

The undisputed evidence is that Hyundai provided a copy of the warranty to Gartner Buick by placing it in the glove

box of the Sonata (S.R. V2, 44), and that Razor did not ask to see the warranty before she bought the car. (S.R. V2, 107). By providing the limited warranty to the seller, Gartner Buick, Hyundai complied with both the FTC regulations and the Magnuson Moss Act under which Razor brought her suit. Additionally, because Razor did not ask to see a copy of the warranty despite the fact that she was told that one existed, Gartner Buick also complied with the FTC regulations. Therefore, the part of the modified opinion finding that the exclusion of consequential damages contained in Hyundai's limited warranty, and the new rules or requirements that it created, are preempted by the Magnuson Moss Act and the FTC regulations. Without question, this Court should hear further argument on the issue.

3. Alternatively, the Court's pre-sale disclosure rule is impliedly preempted by the Magnuson Moss Act and the FTC regulations

Alternatively, even if the pre-sale disclosure rule pertaining to written warranties is not expressly preempted by the Magnuson Moss Act and the FTC regulations, there is no question that it is impliedly preempted by Congress.

In Illinois, implied preemption takes two forms. *Osman v. Ford Motor Co.*, 359 Ill. App. 3d 367, 372 (4th Dist. 2005). "[A] federal statute implicitly overrides state law either when the scope of a statute indicates that Congress intended federal law to occupy a field exclusively, or when state law is in actual conflict with federal law." *Id.*, citing *Freightliner Corp. v. Myrick*, 514 U.S. 280, 287, 131 L. Ed. 2d 385, 392, 115 S. Ct. 1483, 1487 (1995) (citations omitted in original); *Kellerman v. MCI Telecommunications Corp.*, 112 Ill. 2d 428, 438-39 (1986). The *Osman* court, quoting the U.S. Supreme Court, stated as follows:

> We have found implied conflict preemption where it is 'impossible for a private party to comply with both state

> and federal requirements', or where state law `stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'

Osman, 359 Ill. App. 3d at 372.

"The absence of an affirmative regulation by an agency that is authorized to make such regulations does not discharge its power to do so and does not extinguish Congress' intent to relegate the authority to a federal agency to enact, where appropriate and approved, uniform national standards." *Schiffner v. Motorola, Inc.*, 297 Ill. App. 3d 1099, 1105 (1st. Dist. 1998), citing *Ray v. Atlantic Richfield Co.*, 435 U.S. 151, 178, 55 L. Ed. 2d 179, 201, 98 S. Ct. 988, 1004 (1978). A savings clause in a statute does not foreclose the possiblility of a finding of conflict preemption. *Schniffer*, 297 Ill. App. 3d at 1107.

Many decisions in Illinois have held that state laws and requirements that differ from federal laws, and thereby create a conflict, are impliedly preempted even without an express provision in the federal law. *See Busch*, 169 Ill. 2d 325 (common-law tort claims that seek to impose cautionary labeling requirements for hazardous substances different from those imposed by the Federal Hazardous Substances Act preempted); *Hilst v. GMC*, 305 Ill. App. 3d 792, 796 (3rd Dist. 1999) (common-law claim asserting that an automobile is defectively designed when it lacks air bags is impliedly preempted by the Safety Act); *Schniffer*, 297 Ill. App. 3d at 1099 (plaintiffs claims regarding products that emitted radiation impliedly preempted by FDA regulations and the Electronic Product Radiation Control Act).

In this case, if the Court were not to find express preemption, the pre-sale availability rule imposed by the Court is still impliedly preempted by the Magnuson Moss Act and the FTC regulations. Without question, the pre-sale availability rule expounded in 16 C.F.R. 702.3 conflicts with that im-

posed by the Court in its June 29, 2006 opinion. Hyundai's compliance with the new Illinois rule stands as an obstacle to complying with the federal rule. Therefore, the decision finding that Hyundai's warranty exclusion was unconscionable should be revisited, or at the least, the Court should rehear the issue.

II. Fairness dictates that Hyundai's "failure" to cite to one section of the FTC regulations should not act as a bar for denial of the arguments made by Hyundai

In its modified opinion, the Court held that Hyundai waived the issue of its compliance with the FTC regulations and the different roles played by the seller and warrantor in the sales transaction by failing to cite specifically to 16 C.F.R. 702.3. Because Hyundai did make these arguments, with citations to supporting law, the issue was not waived. Alternatively, in the interest of justice and ensuring a unified body of law on the subject, this Court should visit the issues before judicially legislating state law opposite to federal law.

A. Hyundai did not waive the issue related to the different roles played by the warrantor and seller in the typical sales transaction

Hyundai argued numerous times in its petition for rehearing that it was simply the warrantor in the sales transaction, and as such, did not have primary responsibility for making sure that the warranty was given to Razor. For example, Hyundai argued the following points:

- "The Court overlooked the fact that, in this case, Hyundai was the warrantor and the seller was Gartner Buick." (R. V1, C3-11) (App. 2, p. 7);
- "There is no testimony that Hyundai had, or has, control over Gartner Buick, the language of the Retail Installment Contract, or the sales transaction between Gartner Buick and Razor." (App. 2, p. 7);

- "Many consumer-product transactions, including the sale of vehicles, computers, appliances, electronics, furniture, and machinery, are affected by this decision, because they involve warrantors who are not retail, end-user sellers. In all those scenarios, the exclusions contained in the limited written warranties offered by the manufacturer or distributor will be considered unconscionable unless the warrantor finds some way to intervene and interject warranty terms in the retailer's sale of the product." (App. 2, p. 8); and
- "By holding that exclusions are unconscionable when not presented to consumers before the purchase, this Court places a requirement on warrantors that the Act does not. In fact, the Act specifically states that the Federal Trade Commission ("FTC") is the only party that can '. . . prescribe rules requiring that the terms of any written warranty on a consumer product be made available to the consumer (or prospective consumer) prior to the sale of the product to him.' 15 U.S.C. § 2302. . . . By providing the limited warranty at the time Razor bought the Sonata, Hyundai complied with both the FTC regulations and the Act under which Razor brought her suit." (App. 2, p. 9).

These quotes and arguments show that Hyundai did not waive the argument that its role in the sales transaction was not to provide the warranty to Razor before she signed the purchase agreement. This argument was a significant part of Hyundai's petition.[3] Additionally, Hyundai cited three cases

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[3] This Court's statement that the argument was waived because it was not raised in the circuit court, the appellate court, or the initial briefing before this Court is irrelevant. The finding of unconscionability based on the fact that the warranty was not provided to Razor before she signed the purchase agreement was, at the earliest, first made in the Court's February 2, 2006 opinion. As Justice McMorrow correctly noted, there was never an occasion to raise it before that date.

to support the proposition that inclusion of the exclusion in the warranty in conspicuous letters was enough to show that the exclusion was not unconscionable without regard to whether it was shown to the consumer before the purchase. *See Frank's Maintenance & Engineering, Inc. v. C. A. Roberts Co.*, 86 Ill. App. 3d 980, 990 (1st Dist. 1980), *appeal denied*, 133 Ill. 2d 556 (1980); *Sorce v. Naperville Jeep Eagle, Inc.*, 309 Ill. App. 3d 313, 325-26 (2nd Dist. 1999) and *Basselin v. General Motors Corp.*, 341 Ill. App. 3d 278, 288 (2nd Dist. 2003). Hyundai even cited to the FTC regulations pertaining to the Magnuson Moss Act on page 9 of the Petition for Rehearing. (App. 2).

All of these facts show that Hyundai did not waive the issue regarding its role in the sales transaction (*i.e.*, that the seller was in charge of the sales transaction), and the Court's reliance on Section 702.3 would not have been raising an "argument" on behalf of Hyundai *sua sponte*. Additionally, Hyundai had no way of knowing that this Court would modify its February 2, 2006 opinion—which held that Hyundai's warranty exclusions were unconscionable because they were not included in Razor's purchase contract—to its current holding that the warranty exclusions are unconscionable because the warranty was not shown to Razor. Therefore, Hyundai should not be deemed to have waived the issue. As such, this Court should revisit its unconscionability determination.

B. The interests of obtaining a just result and maintaining a sound body of precedent warrant rehearing regardless of Hyundai's purported waiver

In Illinois, "the waiver rule is a principle of administrative convenience, an admonition to the parties; it is not a jurisdictional requirement or any limitation upon the jurisdiction of a reviewing court." *Price v. Philip Morris, Inc.*, 219 Ill. 2d 182, 345-347 (2005) (Freeman, J., dissenting upon denial of petition for rehearing); *Dillon v. Evanston Hosp.*, 199 Ill. 2d

483, 504 (2002). As this Court has recognized on many occasions, "a reviewing court may, in furtherance of its responsibility to provide a just result and to maintain a sound and uniform body of precedent, override considerations of waiver that stem from the adversarial nature of our system." *In re C.R.H.*, 163 Ill. 2d 263, 274 (1994); *Hux v. Raben*, 38 Ill. 2d 223, 224-25 (1967); accord 155 Ill. 2d R. 366(a)(5). *See also United States v. Printy (In re Estate of Funk)*, 2006 Ill. LEXIS 615, *105 (Ill., Apr. 26, 2006); *Ill. State Chamber of Commerce v. Filan*, 216 Ill. 2d 653, 664 (2005) ("We believe it appropriate to address the parties' arguments on the merits; accordingly, we decline to find waiver.").

This Court has also held that a reviewing court could raise, *sua sponte*, the question whether federal legislation precludes a state action. *Wheeler v. Caterpillar Tractor Co.*, 108 Ill. 2d 502, 507 (1985) ("Although not briefed or argued by the parties, we have, *sua sponte*, raised the question whether under the provisions of section 210 of the Energy .Reorganization Act the preemption is so extensive as to preclude the bringing of this action.").

Here, the interests of justice and sound judicial decision-making weigh in favor of addressing these substantive issues. Absent further review, courts throughout Illinois will interpret the June 29, 2006 opinion as standing for a proposition that is directly at odds with an FTC regulation.

III. The public policy and practical impacts of this Court's ruling are far-reaching and should be addressed by further briefing

The modified opinion, if allowed to stand, impacts Illinois warranty law in a way probably not appreciated by this Court. Despite the inclusion of the phrase "*in this case*" within the opinion, all non-selling warrantors are still left in the position of having all of their warranty exclusions deemed unconscionable based on one fact outside their control: that the

warranty was not shown to the consumer before the purchase. Additionally, this Court's decision is unfair to Hyundai, and now to all warrantors, because it neglected to adopt the federal regulation directly on point, while at the same time, sua sponte found Hyundai's warranty exclusions unconscionable. For these reasons, further briefing should be allowed.

A. Because the Court performed its unconscionability analysis *sua sponte*, and without briefing of the issues before this Court, or any other Court, rehearing should be granted

Razor has never argued that Hyundai's exclusion of incidental and consequential damages was unconscionable because it was not shown to her before she signed the purchase agreement. Such an argument was not included in Razor's pleadings, or her trial testimony before Judge Funderburk, or in the appellate court proceedings or in Razor's Appellee Brief before this Court.

Despite this fact, this Court *sua sponte* reached its unconscionability determination based on this one factor. Hyundai still has not been given an opportunity to address a single proper unconscionability argument made by Razor—the party with the burden of proof of the matter—because she has never made one. Fairness dictates that this issue be fully briefed by the parties, and argument provided to this Court, before such a decision is reached, especially in light of the important preemption arguments raised by Hyundai. This Court should not raise arguments sua sponte on behalf of one party and not the other. Therefore, Hyundai requests that the Court grant its Petition for Rehearing of the June 29, 2006 opinion.

B. The Court's June 29, 2006 opinion is unfair to remote warrantors, and the outstanding policy questions deserve further rehearing

The effect of this Court's decision is that all exclusions in warranties provided by remote warrantors are void and unenforceable when the warranty is not provided to the consumer before a sales contract is signed. Before such a novel requirement is implemented in Illinois, briefing should be had on the following outstanding policy and procedure questions:

(1) Is it possible, or realistic, for warrantors to participate in sales transactions?

(2) Does it make sense to hold that warrantors who sell products through the retail chain be directly involved in the sales transaction?

(3) Does the June 29, 2006 opinion unduly burden interstate commerce by requiring that remote warrantors in Illinois do something that no other state requires?

(4) If warranties are void if not shown to consumers before purchase, can a breach of express warranty suit be had in Illinois?

(5) Will this decision harm consumers in Illinois because warrantors may choose not to warrant products brought into the stream of commerce in Illinois?

None of these questions are answered or even addressed by this Court, and all provide unfair results for one or more of the parties in Magnuson Moss Act litigation. Therefore, this Court should grant rehearing.

C. Because the Court's modified opinion still contains factual and legal misstatements, rehearing should be granted

Further, the modified opinion contains additional factual and legal misstatements. Therefore, rehearing should be granted to address these issues as well.

1. There is no evidence that Hyundai authorized the seller to act on its behalf for this sales transaction, and Hyundai cannot, or should not, be responsible for the seller's responsibilities under the FTC regulations

To support its argument regarding the relationship between Gartner Buick and Hyundai, the modified opinion *sua sponte* cites a Second Circuit case, *Wilbur v. Toyota Motor Sales, U.S.A.*, 86 F.3d 23 (2nd Cir. 1996), that purportedly stands for the proposition that manufacturers of products may be bound by the actions of a seller. (App. 1).

In *Wilbur*, the Second Circuit held that if a warrantor specifically authorizes a dealer to perform a task, *i.e.*, fill in the "in-service" date on the warranty, it is bound by the actions of the dealer performed pursuant to that authority. *Id.* at 27. The court held that summary judgment should not be granted to Toyota based upon a reliance on an exclusion for damages caused by accidents because of the placement of the wrong in-service date by the dealer. *Id.*

The Second Circuit did not hold in *Wilbur* that warrantors and/or manufacturers of products should be bound by the actions of a non-agent seller. Further, such a finding would be contrary to holdings in Illinois and throughout the United States. *See Washington v. Courtesy Motor Sales. Inc.*, 48 Ill. App. 2d 380, 383 (1st Dist. 1964) (plaintiff failed to show in law that an "authorized" dealer, in the sale of a new car, is an agent of the manufacturer rather than an independent merchant); *Connick v. Suzuki Motor Co.*, 174 Ill. 2d 482, 498

(1996) (plaintiffs could not succeed in claim against Suzuki based on statements made by dealers unless they pled and proved "that Suzuki expressly gave authority to the individual dealers to bind them to statements made regarding the Samurai's safety"); *Owens v. Mitsubishi Motors Sales of Am., Inc.*, 2004 U.S. Dist. LEXIS 21764, *7-8 (N. D. Ill., Oct. 27, 2004) (Mitsubishi not bound to statements made by dealer pertaining to odometer without evidence that Mitsubishi told the dealer to make the representation); *Stansifer v. Chrysler Motors Corp.*, 487 F.2d 59, 65 (9th Cir. 1973) (dealership not agent for manufacturer because franchise agreement did not provide power for dealership to bind, and, therefore, the relationship was solely one of buyer and seller).

In this case, Razor has neither alleged nor proven that Gartner Buick was Hyundai's agent. Further, no evidence exists in the record that would support such a finding. Because the *Wilbur* case does not stand for the proposition cited by the Court, and because a holding that sellers of products can potentially bind manufacturers by their actions is improper, when no agency allegations or evidence exists, the Court should revisit its reliance on this decision.

2. The modified opinion improperly places the burden on Hyundai to prove that it complied with the FTC regulation as opposed to placing the burden on Razor to show that there was no compliance

The burden was, and is, on Razor, as the party asserting unconscionability of the exclusion of consequential damages, to produce sufficient evidence of the clause's unconscionability. *Zobrist v. Verizon Wireless*, 354 Ill. App. 3d 1139, 1149 (5th Dist. 2004) ("The burden of proving that the provision is unconscionable was upon the plaintiff."). And, before this decision, all of the recent and factually similar cases have held that before a clause in a document will not be enforced, it must be both procedurally and substantively

unconscionable. *Kinkel v. Cingular Wireless, LLC*, 357 Ill. App. 3d 556, 562 (5th Dist. 2005); *Rosen v. SCIL, LLC.*, 343 Ill. App. 3d 1075 (1st Dist. 2003), *appeal denied*, 207 Ill. 2d 627 (2004); *Basselin v. General Motors Corp.*, 341 Ill. App. 3d at 288.

It is still unclear whether the modified opinion stands for the one of the following propositions: (1) substantive unconscionability does not have to be proved; (2) cases like *Sorce* and *Basselin* are now overruled; (3) an unconscionability hearing need not take place; or (4) a one-factor, *per se* unconscionability analysis can be performed to invalidate exclusions in limited warranties. These issues were never addressed, or even contemplated, by the parties, the courts below, or this Court in either of its opinions.

On the other hand, the Court stated that it was Hyundai's responsibility to raise the defense that it complied with 16 C.F.R. 702.3, instead of Razor's burden to show that the warranty exclusions were unconscionable because they were not shown to her. The only case discussing this issue held that it was the plaintiff's burden to argue evidence in the record showing that the defendant failed to comply with section 702.3. *Rogers v. B.F. Goodrich Co.*, 1984 Tenn. App. LEXIS 2967, *8-9 (Tenn. Ct. App. 1984). Here, the only party that has been held to any standard or burden of proof regarding the validity of the exclusion in the limited warranty has been the defendant, Hyundai. The Court's finding improperly shifted the burden to Hyundai to prove that the warranty exclusion was not unconscionable.

CONCLUSION

Hyundai's Petition for Rehearing should be granted. First, this Court's pre-sale availabilty requirement is preempted by the Magnuson Moss Act and the FTC regulations directly on point. Second, Hyundai did not waive the argument pertaining to the differing roles in the sales transaction between

itself and the seller because it made the argument throughout the initial petition for rehearing; but even if that argument were waived, the Court should have visited it *sua sponte* in order to achieve a just and uniform body of law on the subject. Third, because of the myriad of public policy and practical questions remaining after the modified opinion, rehearing should be granted.

For all of the reasons stated above, Hyundai respectfully requests this Court grant its petition for rehearing of the June 29, 2006 opinion. If the Court would deem it beneficial, counsel for Hyundai would be pleased to submit additional briefs and/or reargue the issues presented in light of the arguments made within this petition.

Respectfully submitted,

HYUNDAI MOTOR AMERICA

By: /s/ Denean K. Sturino
DENEAN K. STURINO
One of its Attorneys

Denean K. Sturino
FAGELHABER, LLC
55 E. Monroe St., 40th Floor
Chicago, Illinois 60603
(312) 346-7500

Hugh C. Griffin
Hugh S. Balsam
LORD, BISSELL & BROOK LLP
111 S. Wacker Drive
Chicago, Illinois 60606
(312) 443-0700

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APPENDIX G

[6750-01]

FEDERAL TRADE COMMISSION

WARRANTIES COMPLYING WITH MAGNUSON-MOSS WARRANTY ACT

Applicability of Certain Provisions of California State Law; Final Findings and Determination

AGENCY: Federal Trade Commission.

ACTION: Final findings and determination in the proceeding.

SUMMARY: Magnuson-Moss Warranty Act § 111 states the Federal scheme for the effect of Federal law on state warranty provisions. Paragraph (c) (1) provides that certain types of State pro-visions will be inapplicable to warranties complying with the Federal law. However paragraph (c) (2) preserves such provisions if the Commission finds they meet certain criteria stated in the Act. The State of California filed two applications under this paragraph. The Commission's determination on the applications is set forth below. The Commission's final determination includes an explanation of the scheme of § 111.

FOR FURTHER INFORMATION CONTACT:

Rachel Miller, Attorney, Division of Special Statutes, 202-724-1100, or Charles Taylor, Attorney, Division of Marketing Practices, 202-523-3660, Federal Trade Commission, Washington, D.C. 20580.

SUPPLEMENTARY INFORMATION: The California state provisions included in the application of July 1, 1975, are the following:

Civil Code Sections 1790-1795 (Song-Beverly Consumer Warranty Act)

Civil Code Section 1797

Commercial Code Section 2801

Health and Safety Code Sections 39156-39157

Vehicle Code Sections 9975, 34715

In addition, the State of California submitted a supplemental application, dated November 2, 1976, requesting consideration of the following provisions as amended by the 1976 Amendments to the Song-Beverly Act:

§§ 17904, 1791, 1793.3, 1793.6, 1794.1.

The Commission initially determined that the only provisions subject to § 111 (c) (1) were the following four sections of the Civil Code:

§ 1793.1(b) (disclosure of warrantor's repair facilities)

§ 1797.3 (mobile home warranty title)

§ 1797.3(d) (disclosure of warrantor's telephone number in mobile home warranties)

§ 1797.5 (posting of mobile home warranties)

It therefore initiated this rulemaking proceeding to determine if any of these provisions meet the requirements of § 111(c)(2) for preservation.

The Commission also considered the supplementing application of November 2, 1976, and found that none of the provisions as amended are subject to § 111 (c) (1) of the federal Act.

NOTICES

Findings and Determinations

I. History of the Proceeding

This proceeding was initiated by the Commission July 9, 1976, in response to an application filed by the State of California pursuant to the provisions of Title I, Section 111(c) (2), 15 U.S.C. 2311(c)(2), of the Magnuson-Moss Warranty-

Federal Trade Commission Improvement Act, Pub. L. 93-637, 15 U.S.C. 2301, et seq., (1975) (hereinafter the "Warranty Act").

The initial notice of this proceeding, together with staff's analysis of the California state law provisions submitted with the application, was published in the Federal Register on July 9, 1976 (41 FR 28361). All interested persons were invited to file written data, views or arguments concerning this matter or to present such information orally at public hearings. A period of 60 days was allowed for submission of written comments. Public hearings, as announced in the notice, were held September 13-14, 1976, in Los Angeles, California, and September 20, 1976, in Washington, D.C., with Mr. John A. Gray, Attorney, Office of the Special Assistant Director for Rulemaking, Bureau of Consumer Protection, pre-siding. Every person who had expressed a desire to present his views orally at these hearings was accorded the opportunity to do so. The public record remained open for the receipt of written data, views or arguments until October 20, 1976.

Section 111(c) of the Warranty Act (15 U.S.C. 2311(c)), Provides:

> (c)(1) Except as provided in subsection (b) and in paragraph (2) of this subsection, a State requirement—
>
> (A) which relates to labeling or disclosure with respect to written warranties or performance thereunder;
>
> (B) which is within the scope of an applicable requirement, of sections 102, 103, and 104 (and rules implementing such sections) ; and
>
> (C) which is not identical to a requirement of section 102, 103, or 104 (or a rule thereunder),

shall not be applicable to written warranties complying with such sections (or rules thereunder).

(2) If, upon application of an appropriate State agency, the Commission determines (pursuant to rules issued in accordance with section 109) that any requirement of such State covering any transaction to which this title applies (A) affords protection to consumers greater than the requirements of this title and (B) does not unduly burden inter-state commerce, then such State requirement shall be applicable (notwithstanding the provisions of paragraph (1) of this sub-section) to the extent specified in such de-termination for so long as the State administers and enforces effectively any such greater requirement.

Section 111(b), 15 U.S.C. 2311(b), provides:

(b)(1) Nothing in this title shall invalidate or restrict any right or remedy of any consumer under State law or any other Federal law.

(2) Nothing in this title (other than sections 108 and 104(a) (2) and (4)) shall (A) affect the liability of, or impose liability on any person for personal injury, or (B) supersede any provision of State law regarding consequential damages for injury to the person or other injury.

In its initial notice the Commission indicated that four provisions of the California laws submitted for Commission analysis would be affected by operation of § 111(c) of the Warranty Act, i.e. Sections 1793.1, 1797.3 and 1797.5 of the California Civil Code. That notice stated:

(1) Section 1793.1(b) of the Song-Bevery Consumer warranty Act, while similar to dis. closures required by 16 CFR § 701.3(a) (5) 01 the regulations implementing § 102 of the warranty Act, is not identical to that requirement;

(2) The "Mobile Home warranty" designation requirement of California Civil Code § 1797.3 is not identical to the provisions of § 103 of the warranty Act;

(3) That part of 1797.3(d) of the California Civil Code which requires disclosure of telephone numbers is not identical to the disclosure provided by 16 CFR 701.3(a) (5); and

(4) The pre-sale availability requirement; of § 1797.5 of the California Civil Code are not identical to the requirements of 16 CFA Part 702 which also implements warranty Act § 102.[1]

The purpose of this proceeding is:

to determine, pursuant to the California petition and the provisions of section 111(c) (2) of the Warranty Act (15 U.S.C. 2311(c) (2)), whether the above described State requirements afford protection to consumers greater than the requirements of the Warranty Act and do not unduly burden interstate commerce. If it is determined that a provision of the State law affords protection to consumers greater than the requirements of the Warranty Act and that such provision does not unduly burden interstate commerce, then the provision will be applicable to written warranties in compliance with the federal requirements to the extent specified in such determination for as long as the State of California administers and enforces effectively such greater requirement.

II. Threshold Issues

As a general rule Federal and state consumer protection laws are read harmoniously and viewed as supplementing

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[1] 41 FR 28362 (1976). It was noted that provisions (1), (3) and (4) would be-affected only after the rules implementing section 102 of the warranty Act are effective. *See* 40 Fed. Reg. 60168 (1975), 16 CFR Parts 701, 702. The Rules became effective as of Decem

each other rather than being in conflict.[2] The courts have determined that Federal laws will preempt state consumer protection laws only when the state legislation frustrates the full effectiveness of the Federal laws, or when compliance with both is a physical impossibility.[3]

The Congress, in its consideration of the Warranty Act, plainly recognized these principles and expressed its intention in this area by including a section to deal with these matters—§ 111 entitled "Effect on Other Laws."

Section 111(c)[4] is the centerpiece for the preemption scheme established by Congress. It provides that state labeling and disclosure requirements which are within the scope of requirements of the Warranty Act provisions (§ 101, 103, or 104), or rules thereunder, governing warranty disclosures, designations and minimum standards, and which are not identical to those requirements, are inapplicable to warranties which meet the federal requirements.

Section 111(c) (2) provides a Procedure whereby states may petition the Commission for permission to enforce state laws regarding written warranty labeling or disclosures which are not identical to the requirements of the Warranty Act and which would otherwise be rendered inapplicable to written warranties complying with Federal standards.

Section 111(b)[5] preserves all rights and remedies of consumers under state or other federal laws and state require-

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[2] See, e.g., *Double-Eagle Lubricants v. State of Texas*, 248 F. Supp. 515, 518 (1965), *Head v. New Mexico Board of Examiners*, 374 U.S. 424, 427, (1963).

[3] See generally *Perez v. Campbell*, 402 Hines 632 (1971); *Florida Lime and Avocado Growers, Inc. v. Paul*, 373 U.S. 132 (1963); *Hines v. Davidowitz*, 312 U.S. 52 (1941).

[4] See Part I, supra.

[5] See Part I, supra.

ments directed at liability for personal injury or consequential damages.

During this proceeding numerous alternative interpretations for various sections were advanced. The Commission believes it is important to formulate a consistent interpretation of the section as a whole before proceeding to examine the specific issues raised by the California Application. The Commission has carefully considered the various interpretations and the history of the section. This discussion should give states, consumer groups and industry representatives a guide to the Commission's approach in interpreting this provision.[6]

The first issue concerns the scope of the exception provided for in paragraph (b). Specifically, does the phrase "right or remedy of any consumer" include rights under a state labeling or disclosure requirement?[7] In California for example, under the provisions of the Song-Beverly Act a consumer can maintain an action at law if he is injured by a failure to comply with that Act's requirements. If that Act contained a warranty disclosure provision—for example, that every written warranty contain the manufacturer-warrantor's telephone number—which was otherwise within the scope of § 111(c), would it be excluded from pre-emption because it is a consumer right?

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[6] Ordinarily, the views of the agency charged with implementing a statute are accorded great weight. See *Red Lion Broadcasting v. FCC*, 395 U.S. 367, 381 (1969); *Udall v. Tallman*, 380 U.S. 1, 16 (1964).

[7] During the course of this proceeding the State of California took the position that state requirements concerning written warranty disclosures and labeling can provide consumer rights within the meaning of paragraph (b). See Testimony of Herschel Elkins, Deputy Attorney General, State of California, Transcript pp. 46-50 (Tr. 46-50). See also Statement of Center for Auto Safety, Record pp. 118-124 (R. 118-124), and Testimony of Dennis Kavanagh, Counsel, Golden State Mobilehome Owners League, Inc., Tr. 15.

Since one of the purposes of this legislation is to provide standards for disclosures in written warranties, Congress could not have intended for disclosure or labeling provisions to be automatically construed as consumer rights and preserved. Rather, the Commission believes that Congress established the procedure described in subparagraph (2) of § 111 (c) as the proper means by which to determine future applicability of such disclosure and labeling provisions.[8]

Were it otherwise, the federal disclosures scheme would be completely frustrated. If, for example, a state disclosure or labeling requirement, preserved by operation of (b), were directly contradictory to the Federal rules, under the terms of (b) the normal preemption rules would not prevail, and the Federal provision, not the state provision, would fall.

The proviso in § 111(c) "except as provided in (b)" makes it absolutely clear that consumer rights and remedies under state law would never be affected by the Warranty Act. The proviso may have been intended to distinguish between a consumer right to information and a requirement to provide information in a particular form or manner (e.g., in the warranty document). It is even possible that the presence of the proviso in the final Act is due to a drafter's error. The scope of § 111 was limited by the Conference Committee to labeling and disclosure provisions. The House and Senate versions of the legislation would have included performance requirements in the preemption scheme. The proviso preserving consumer rights and remedies was contained in the House version. The Conference Committee took out references to performance requirements but it left in-perhaps to

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[8] It should be remembered too that this statute was passed prior to the recent Supreme Court decision recognizing a First Amendment "right" to commercial information. See *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 96 Sup. Ct. 1817 (1976).

make it entirely clear-the provision that the Act would not affect consumer rights or remedies.

The phrase "right or remedy of any consumer" in § 111(b), therefore, does not include any right to a specific man of disclosure or labeling of information.

The next issue concerns the scope of the preemption scheme itself. Section 111(c) (1) lists three elements which a state requirement must meet to be within the scope of this section. These requirements are in the conjunctive; all must be found for a requirement to be within the scope of the section.[9]

Penny's would place a nonexistent "or" between the clauses, which the Commission believes would be contrary to the legislative intent.

First, the state requirement must relate to "labeling or disclosure with respect to written warranties or performance thereunder. It is the Commission's view that the phrase "with respect to written warranties or performance thereunder" in

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[9] The legislative history of the Warranty Act indicates that the House version of § 111(c) (1) was adopted in the Act. From a reading of that section it appears clear that § 111(c) (1) (A), (B), and (C) were meant to be conjunctive, and the absence of an "and" between subparagraphs (A) and (B) is merely the result of a normal grammatical process. See also University of Chicago Press "A Manual of Style," § 5.64 (12 ed., 1969) and the comments of the Center for Auto Safety, R. 127-128, and National Consumer Law Center, R. 114-115.

But see Statement of J. C. Penney Co., R. 150. Penney's contended that:

> [T]he staff analysis relies upon a conjunctive construction at the end of section 111(c)(1)(A), thus inferring the presence of a nonexistent "and" and substitutes the inferred "and" for the semicolon which actually appears. Penney disagrees with this interpretation and believes that the presence of the semicolon further established a Congressional intent to preserve uniformity of written warrany requirements.

§ 111(c) (1) (A) was intended to modify the phrase "which relates to labeling or disclosure." Thus we interpret the clause to mean that state requirements which relate strictly to warranty performance, and which do not involve warranty labeling or disclosure of terms, are outside the scope of § 111(c). In other words, we read this clause as dealing with state requirements which relate to labeling or disclosure with respect to written warranties, and with state requirements which relate to labeling or disclosure with respect to performance under written warranties.

This construction is supported by the legislative history of this section. While the scope of this provision, as proposed in both houses, extended to labeling disclosure and "other requirements"[10] or "other matters,"[11] this latter language was dropped in the Conference Committee. No explanation for this is provided in the Conference Report but it may be inferred that Congress intended that the scope of this section should extend only to labeling and disclosure provisions.

Second, the state requirement must be within the scope of § 102, 103 or 104 (or rules thereunder). Section 102 of the Warranty Act authorized Commission promulgation of FTC regulations governing disclosure of written warranty terms and conditions of consumer product warranties. A rule has been promulgated pursuant to the statutory mandate establishing requirements for warrantors for disclosing written warranty terms and conditions. Thus, a state requirement would be within the scope of the Federal requirement if it requires disclosure of terms in a written warranty in a manner different from the Federal rules or if it requires disclosure of additional terms in the warranty.[12] The Commission has also promulgated a rule establishing requirements for pre-sale

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[10] S. 356, 93d Cong., 1st Sess., § 113(b) (1973).

[11] H.R. 7917, 93d Cong., 2nd Sess., § 111(c) (A) (1973).

[12] 16 CFR Part 701.

availability of warranty terms. A state requirement would be within the scope of this requirement if it establishes written warranty pre-sale availability requirements different from or in addition to those of the federal rule.[13] Section 103 and 104 create a labeling scheme for warranties.[14] These sections divide the universe of warranties into two types—*i.e.*, those which meet the Federal minimum requirements for a warranty ("full" warranties) and those which do not ("limited" warranties). The Commission has stated that these designations must appear clearly and conspicuously as a caption or prominent title of the warranty.[15] A state requirement would be within the scope of these provisions if it imposed a warranty designation requirement different from the Federal scheme or if it attempted to alter the standards for qualifying for the Federal "full" warranty designation.

Finally, the state requirements must be different from the Federal requirement.

If all the conditions above are met, then the state requirement will be rendered inapplicable to written warranties complying with the provisions of the Warranty Act section or rules thereunder. Thus § 111(c) does not in fact pre-empt state provisions; it merely renders them inapplicable to warranties which meet the Federal requirements.

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[13] 16 CFR Part 702. Note that other rules are authorized by § 102; as they are promulgated, additional state rules may fail with-in their scope.

[14] Section 104 appears to be a group of substantive provisions and in fact is en-titled "Federal Minimum Standards For warranty." However, the fact that no warrantor need meet these requirements, but must merely choose a "designation" or label depending on whether he meets them, makes those requirements merely part of the labeling scheme established in § 103.

[15] FTC Magnuson-Moss warranty Act Implementation and Enforcement Policy, 40 Fed. Reg. 25721 (June 18, 1975); Interpretations of Magnuson-Moss Warranty Act 16 CFR Part 700, 42 Fed. Reg. 36112 (July 13, 1977).

Further, subparagraph (2) of § 111(c) provides for a procedure whereby such state requirements can be made applicable even to warranties meeting Federal regulations. A State may apply to the Commission for this determination. In reaching this determination, the Commission must-consider whether the state requirement in question affords protection to consumers greater than the requirements of the Warranty Act and does not unduly burden interstate commerce.

The questions of greater protection and undue burden are complex issues requiring careful analysis. They can only be answered on a case-by-case basis. The Commission believes the proponent of the state requirement has the burden of showing that the requirement provides more protection to consumers than the Federal requirement. Likewise, persons viewing the state requirement as unduly burdensome have an obligation to support, by more than mere conclusory statements and unsupported allegation, their contentions with respect to a requirement's burdensomeness.

It should be noted that U.S. Supreme Court decisions interpreting the Commerce Clause (U.S. Const., Art. I, § 8, cl. 3) have established that only undue and discriminatory burdens are forbidden by the Commerce Clause.[16] The Commission believes these decisions set forth the basic criteria for determining whether a State requirement constitutes an "undue burden on interstate commerce" for purposes of subparagraph (2) of § 111(c).

One final point should be added to this analysis. Warrantors and industry commentators throughout this proceeding argued that the purpose of the Warranty Act was to preserve uniformity of warranties—*i.e.*, to ensure that nationwide manufacturer warrantors would not have to comply with

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[16] See, e.g., *Huron Portland Cement Co. v. Detroit*, 362 U.S. 440, 443-444 (1960) ; *Breard v. City of Alexandria*, 841 U.S. 622, 640-641 (1951); *Dean Milk Co. v. City of Madison*, 340. U.S. 349, 354 (1951).

a multiplicity of State laws on the subject. They base their contentions on the Committee Reports[17] published before the Conference Committee changed § III. The purpose of the Act, however, is to provide minimum disclosure and content standards for warranties.

The Commission believes that Congress rejected the idea of uniformity of warranties as the major purpose of § 111 (c) when it limited its scope to labeling and disclosure requirements. It also rejected the idea of uniformity of disclosure requirements as predominant when it rejected the Senate's absolute preemption scheme and substituted the House version which provides for a savings procedure for such State laws. While uniformity of warranty documents is a goal of § 111, therefore, it is by no means the predominant goal.

As noted herein, because of the comments received during this proceeding and re-examination of the legislative history of the Warranty Act, the Commission has made slight changes in its analysis of § 111 since publication of the initial notice. One additional point should be made in this regard. As discussed above, the Commission is now convinced that the legislative history of § 111 supports the conclusion that the section was meant to apply only to written warranty labeling and disclosure requirements and not to substantive warranty performance requirements. Therefore, the earlier analysis of several sections which were declared exempt from preemption, either because they contained performance requirements identical to those of § 104 or because they constituted consumer rights or remedies, would instead be considered outside the scope of this section because they do not involve written warranty labeling or disclosure. More specifically, see the discussion in staff's analysis, published with the initial notice, concerning California Civil Code § 1793.2, 1793.5 and 1797 to 1797.4.

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[17] S. Rep. No. 93-151, 93rd Cong. 1st Sets. (1973); H.R. Rep. No. 93-1107, 93rd Cong., 2nd Sees. (1973).

III. Consideration of State Requirement

A. Disclosure of repair facilities

Section 102 of the Warranty Act mandates that the Commission promulgate rules requiring full disclosure of written warranty terms and conditions. The Commission has carried this directive by promulgating 16 CFR Parts, 701, 702 which became effective December 31, 1976.

Section 701.3(a)(5)[18] of the commission's regulations implementing §102 requires that a written warranty contain the mailing address of the warrantor or the person responsible for performance of warranty obligations.

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[18] CFR § 701.3(a) entitled "Written warranty terms" provides, in pertinent part:

> "(a) Any warrantor warranting to a consumer by means of written warranty . . . shall clearly and conspicuously disclose in a single document in simple and readily understood language,: the following items of information
>
> . . . .
>
> "(5) A step-by-step explanation of the procedure which the consumer should follow in order to obtain performance of any warrant obligation, including the persons or class of persons authorized to perform warranty obligations. This includes the name(s) of the warrantors, together with the mailing address(es) of the warrantor(s) and/or the name or title and the address of any employee or department of the warrantor responsible for the performance of warranty obligations, and/or a telephone number which consumers may use without charge to obtain information on warranty performance * * *"

Section 1793.1(b)[19] of the California Civil Code provides that a warrantor who maintains service and repair facilities in. California must disclose the location of such facilities by one of three methods. The warrantor may (1) give the buyer a list showing the name an address of each such repair facility; or (2) give the name, address and telephone number of the repair facility central directory within the state or toll free number; or (3) maintain at the seller's premises a list of authorized service facilities In the latter instance, it is the duty of the seller to provide the name, address and telephone number of the nearest repair facility upon request.

This section of the Federal regulation concerns disclosures of the location o the warrantor or the person responsible for warranty performance. The State of California, for the protection of consumers in that state, has established a similar

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[19] (b) Every manufacturer, distributor, or retailer making express warranties and who elects to maintain service and repair facilities within this state pursuant to the provisions of this chapter shall:

"(1) At the time of sale, provide the buyer with the name and address of each such service and repair facility within this state, or

"(2) At the time of sale, provide the buyer with the name and address and telephone number of the service and repair facility central directory within this State, or the toll-free telephone number of a service and repair facility central directory outside this state. It shall be the duty of the central directory to provide, upon Inquiry, the name and address of the authorized service and repair facility nearest the buyer; or

"(3) Maintain at the premises of retail sellers of the warrantor's consumer goods a current listing of such warrantor's authorized service and repair facilities, or retail sellers to whom the consumer goods are to be returned for service and repair, which ever is applicable, within this state: It shall be the duty of every retail seller provided with such a listing to provide, on inquiry; the name, address, and telephone number of the nearest authorized service and repair facility, or the retail seller to whom the consumer goods are to be returned for service and repair, whichever is applicable."

requirement that the location of repair facilities be disclosed, but the disclosure required is more comprehensive than that prescribed by the Federal regulations.

At the hearing on this matter it was also brought out by the State of California that so long as the required information is presented (or is available) at the time of sale it need not be disclosed it the written warranty itself.[20] A reading of the statute confirms that nowhere does the provision require a disclosure in the written warranty itself, although inclusion in the warranty is one way to comply.

As discussed above, the scope of Warranty Act § 102 and the regulations promulgated thereunder extends only to information that is required in a written warranty. As the California State provision does not mandate written warranty terms or disclosures, it is not within the scope of Warranty Act § 102 or the regulations promulgated thereunder.

The Commission concludes therefore that § 1793.1(b) of California's Civil Code is not a warranty requirement within the scope of § 111 of the Warranty Act and thus is not subject to preemption.

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[20] Testimony of Herschel Elkins, Deputy Attorney General, State of California, Tr. pp. 57-58, 60-62. *See* also Statement of Center for Auto Safety R 116 n. 2 and R 117 n. 5.

B. Mobile home warranty title requirement. Section 103[21] of the Warranty Act requires that a warrantor clearly and conspicuously designate, or label, its warranty either "full" (statement of duration) warranty" or "limited warranty." Section 1797.3[22] of the California Civil Code requires a written warranty to be given in connection with the sale of mobile homes, and requires this warranty to be entitled "Mobilehome Warranty."

The Commission in its Final Interpretations, 16 CFR 700.6(a), 42 FR 36112 (July 13, 1977), stated that the "full' and "limited" designations provided b3 the Act "are the exclusive designation permitted under the Act, unless a specific exception is created by rule." The Commission also stated that the appropriate designation "should appear clearly and conspicuously as a caption, or prominent title," to the warranty. The Commission intended to ensure that readers would focus in the first instance on the status of the warranty with respect to the Federal standards for warranties, The California requirement, which would lead consumers to focus instead on the product being warranted, is inconsistent with this goal.

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[21] Warranty Act § 103, 15 U.S.C. § 2303, provides in pertinent part:

"(a) Any warrantor warranting a consumer product by means of a written warranty shall clearly and conspicuously designate such warranty in the following manner, * * *:

"(1) If the written warranty meets the Federal minimum standards for warranty set forth in section 104 of this Act, then it shall be conspicuously designated a 'full (statement of duration) warranty.'

(2) If the written warranty does not meet the Federal minimum standards * * * then it shall be conspicuously designated a 'limited warranty.

[22] The mobilehome warranty from the manufacturer or dealer to the buyer shall be set forth in a separate written document entitled 'Mobilehome Warranty,' * * *"

The state provision thus is a labeling provision within the scope of a requirement of § 103 of the Warranty Act, and not identical to it. It is therefore subject to the provisions of § 111(c) of the Act. The provision may be preserved, however, under paragraph (c) (2) of that section if it affords consumers greater protection than the Federal requirement and does not unduly burden interstate commerce. California Deputy Attorney General Herschel testified that many mobile homes are now sold with a number of separate warranties on different portions of the home, and that consumers are frequently confused as to the coverage of a particular warranty. He stated that preservation of the state provision would assist consumers in knowing just what the warranty covers.[23] However, a statement of what the warranty covers must in any event appear in the warranty. The Commission finds that this state provision does not afford the necessary greater protection to consumers. Therefore it shall not be applicable to warranties which comply with the Federal rule.

C. Telephone number requirement. Section 701.3(a) (5)[24] of the rules implementing Warranty Act § 102 requires disclosure of the mailing address where consumers may obtain information on warranty performance; however, disclosure of a telephone number which consumers may use to obtain such information is optional. Section 1797.3 of the California Civil Code requires that the mobile home warranty mandated therein contain the address and. phone number of where to mail or deliver written notices of defects.[25]

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[23] Testimony of Herschel Elkins, Deputy Attorney General, State of California, Tr. 66.

[24] *See* note 16, *supra.*

[25] "Section 1797.3 provides that a written warranty be delivered to the buyer of a mobile home at the time the contract for sale is signed and that the warranty contain certain terms. Term (d) provides that "the address and telephone number of where to mail or deliver written notices of defects shall be set forth in the document."

This state provision is within the scope of a requirement of a rule promulgated under § 102 of the Warranty Act, since it requires certain information to appear in the warranty itself. Further, it is not identical to the Federal requirement, and is therefore subject to preemption under § 111(c) of that Act. The provision may be preserved, however, under paragraph (a) (2) of that section if it affords consumers greater protection than the Federal requirement and does not unduly burden interstate commerce.

The state requirement compels the use of a telephone system for receiving consumer grievances. Warrantors who do not presently have such a system would be required to install one. The National Retail Merchants Association[26] stated that the requirement would therefore be a burden. However, such a requirement affords significantly greater protection to consumers than the Warranty Act which has no such requirement.[27] The consumer has a fast and convenient method of communication with the warrantor. The consumer can make personal contact with the responsible party, and can receive an immediate response. Any burden imposed on the warrantor is outweighed by the benefit to the consumer of having this communication system available.

For those warrantors who presently have a way of consumer complaints by telephone, listing the telephone number in the warranty is merely a slight inconvenience. While the burden could be greater on nationwide warrantors if other states were to impose a similar requirement,[28] it is hardly an

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[26] R 167.

[27] *See* Testimony of Dennis Kavanagh, General Counsel, Golden State Mobilehome Owners League, Inc., Tr. 11-12; Testimony of Herschel Elkins, Deputy Attorney General, State of California, Tr. 66-68.

[28] *See* Statements of Champion Home Builders Co., R 145; Fleetwood Enterprises, Inc., R 137; Skyline Corp., R 130.

undue burden within the meaning of § 111 (c) (2) of the Warranty Act.

It must be noted that industry representatives offered absolutely no data to establish the burdensomeness of this requirement.

The Commission therefore concludes that- this requirement provides consumers greater protection than the Warranty Act requirement and will not unduly burden interstate commerce. Furthermore, the state has made an adequate showing that it has the capability to enforce this provision. According to the remarks of the Deputy Attorney General, California's Attorney General has authority under common law principles as well as under California Civil Code § 3369 to bring actions against companies engaging in unlawful and unfair business practices.[29] The state requirement will therefore continue to be applicable to warranties complying with the Magnuson-Moss Warranty Act and regulations thereunder.

Act authorizes the Commission to prescribe rules "requiring that the terms of any written warranty on a consumer product be made available to the consumer (or prospective consumer) prior to the sale of the product to him. A rule implementing this provision was promulgated by the Commission and be-came effective December 31, 1976.[30] The rule requires that warrantors' written warranties be made available to consumers prior to sale by one of four methods.[31]

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[29] See Testimony of Herschel Elkins, Deputy Attorney General, State of California, Tr. 51-54; and *People v. Arthur Murray,* 238 *(CA* 2d) 333, 348-349; *People v. Superior Court,* 9 (CA 3d) 283, 287.

[30] 16 CFR Part 702.

[31] 16 CFR § 702.3 (a) entitled "Pre-sale availability of written warranty terms" provides in pertinent part that:

"[T]he seller of a consumer product with-a written warranty shall:

This requirement may be met by displaying the warranty in

"(1) Make available for the prospective buyer's review, prior to sale, the text of such written warranty by the use of one or more of the following means:

"(i) Clearly and conspicuously displaying the text of the written warranty in close conjunction to each warranted product; and/or

(ii) maintaining a binder or series of binders which contain(s) copies of the warranties for the products sold in each department in which any consumer product with a written warranty is offered for sale. Such binder(s) shall be maintained in each department, or in a location which provides the prospective buyer with ready access to such binder(s), and shall be prominently entitled 'Warranties' or other similar title which clearly identifies the binder(s). Such binder(s) shall be indexed according to product or warrantor and shall be maintained up to date when new warranted products or models or new warranties for existing products are introduced into the store or department by substituting superseding warranties and by adding new warranties as appropriate.

"The seller shall either:

"(A) display such binder(s) in a manner reasonably calculated to elicit the prospective buyers attention; or

"(B) make the binders available to prospective buyers on request, and place signs reasonably calculated to elicit the prospective buyer's attention in prominent locations in the store or department advising such prospective buyers of the availability of the binders, including instructions for obtaining access; and/or

"(iii) displaying the package of any consumer product on which the text of the writ-ten warranty is disclosed, in a manner such that the warranty is clearly visible to prospective buyers at the point of sale; and/or

"(iv) placing in close proximity to the war-ranted consumer product a notice which discloses the text of the written warranty, in a manner which clearly identifies prospective buyers the products to which the notice applies."

Section 702.3(b) requires warrantors to make required materials available to sellers.

close conjunction with the product, by maintaining copies of warranties in a binder available to the consumer, by displaying the product's package if the warranty appears on it, or by posting a sign containing the warranty. Section 1797.5[32] of the California contracts are signed a notice stating the existence of a one-year warranty and a sample copy.

This State provision is a requirement within the scope of a rule promulgated under § 102 of the Warranty Act. Further, it is not identical to the Federal requirement and is therefore subject to preemption under § 111(c) of that Act. The provision may be preserved, however, under paragraph (c)(2) of that section if it affords consumers greater protection than the Federal requirement and does not unduly burden interstate commerce.

National Retail Merchants Association asserted that this State provision appears to offer less protection than the Federal regulations because it does not require that the warranty itself be displayed.[33] However, the representative of the State of California disagreed with this interpretation and stated that copies of warranties must be posted.[34]

The provision therefore differs from the Federal requirement in two ways. First, the State provision requires posting of the text of the warranty, whereas the Federal rule permits, as an alternative to posting the text, the use of a binder which is calculated to attract shoppers' attention or whose availability is announced by similarly conspicuous, signs. Second, the State provision requires the display of the warranty in the area

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[32] "*Notice of warrant; display; posting.* Every dealer shall display a notice of reasonable size stating the existence of a one-year warranty and a sample copy of such warranty. The notice shall be posted in each area where purchase orders and conditional sales contracts are written."

[33] R 168.

[34] Testimony of Herschel Deputy Attorney General, State of California, Tr. 68.

where sales contracts are signed, while the Federal options regarding posting of the warranty require it to appear where the warranted products are displayed. In the mobile home industry, the functions of product display and contract signing are likely to be performed in separate areas. Thus, compliance with the State provision will not be sufficient compliance with the Federal rule, and vice versa. Preservation of the state method of presale availability will therefore entail for sellers separate compliance with the State and Federal provisions. The Commission is not convinced that posting a copy of the warranty in the area for contract signing, where consumers may well never go until their purchase decision has already been made, provides greater protection than posting signs announcing the availability of warranties in the display area. The Commission feels the extra burden on sellers of providing two sets of pre-sale materials is not justified by such benefit to consumers as this state provision may give. The State provision will therefore not be applicable to warranties which comply with the Federal rule. It should be noted, however, that the Commission does not here make any determination of whether a state provision mandating

IV. FINDINGS

In view of the above stated conclusions, the Commission makes the following findings pursuant to its authority under the Warranty Act and specificailly under 15 U.S.C. 2311(c)(2):

(1) California Civil Code § 1793,19(b), which requires that warrantors maintaining service and repair facilities in California disclose the location of such facilities, is not a state requirement within the scope of § 111(c) of the Warranty Act and thus is not subject to pre-emption under that section.

(2) California Civil Code §1797.3, which requires that the state-mandated mobile home written warranty be

titled "Mobilehome Warranty," does not afford protection to consumers greater than the requirements of the Warranty Act, 15 U.S.C. 2301, et seq., and regulations thereunder, and therefore shall not be applicable to warranties complying with that Act.

(3) California Civil Code §1797.3(d), which provides that telephone numbers be disclosed in a state-mandated mobile home written warranty, affords protection to consumers greater than the requirements of the Warranty Act 15 U.S.C. 2301, et seq., and regulations thereunder, and does not unduly burden interstate commerce; therefore, State requirement shall be applicable to warranties complying with the Magnuson-Moss Warranty Act for so long as the state administers and enorces effectivcly such greater requirement.

(4) California. Civil Code § 1797.5 which provides that mobile home dealers display a notice stating the existence of a one-year warranty and a sample COPY of such warranty, does not afford protection to consumers greater than—the requirements of the Warranty Act, 15 U.S.C. 2301, et seq., and regulations thereunder, and therefore shall not be applicable to warranties complying with, that Act.

V. LETTER OF NOTIFICATION TO APPLICANT

For further information, the Commission's letter of notification to the Attorney General of California is set forth:

FEDERAL TRADE COMMISSION,
OFFICE OF THE SECRETARY,

Washington, D.C.

HON. EVELLE J. YOUNGER,

Attorney General, State of California Department of Justice, 3580 Wilshire Blvd., Los Angeles Calif.

(Attention: Herschel Deputy. Attorney General).

DEAR Mr. YOUNGER: The. Commission has concluded the proceeding entitled "Determination of Applicability of California State Law to warrantors Complying with the-Magnuson-Moss warranty Act."

Attached is a copy of the Notice to be published in the Federal REGISTER concerning the Commission's final determination in this matter. Briefly, the Commission made the following findings pursuant to its authorizes under the Warranty Act and specifically under § 111(c) (2); 15 U.S.C. § 2311(c) (2):

(1) California Civil Code § 1793.1(b) which requires that warrantors maintaining service and repair facilities in California disclose the location of such facilities, is not a state requirement within the scope of § 111(c) of the warranty Act and thus is not subject to preemption under that section.

(2) California Civil Code § 1797.3, which requires that the state-mandated mobile home written warranty be entitled "Mobile home warranty," does not afford protection to consumers greater than the requirement: of the warranty Act, 15 U.S.C. § 2301, et seq. and regulations thereunder, and therefore shall not be applicable to warranties complying with that Act.

(3) California Civil Code § 1797.3(d) which provides that telephone numbers be disclosed in a state-mandated mobile home written warranty, affords protection to consumers greater than the requirements of the Warranty Act, 15 U.S.C. § 2301, et seq., ant regulations thereunder, and does not unduly burden interstate commerce; therefore, this State requirement shall be applicable to warranties complying with the Magnuson-Moss warranty Act for so long as the state administers and enforces effectively such greater requirement.

(4) California Civil Code § 1797.5, which provides that mobile home dealers display s notice stating the existence of a one-year warranty and a sample copy of such warranty, does not afford protection to consumers greater than the requirements of the Warranty Act, 15 U.S.C. § 2301, et seq., and regulations thereunder, and therefore shall not be applicable to warranties complying with that Act.

Recently, you requested an additional hearing under the warranty Act on recent amendments to the Song-Beverly Act. Specifically, you requested a Commission determination that 1790.4, 1791, 1793.3 and 1794.1 and the new Civil Code Section 1793.6, which went into effect January 1, 1977, afford protection to consumers greater than the requirements of the warranty Act and do not unduly burden interstate commerce. However, since none of the amendments relate to labeling of or disclosures in written warranties, the Commission has determined that these provisions are outside the scope of § 111(c) of the warranty Act and thus not subject to preemption under that section. The Commission believes, therefore, that a hearing on this matter is unnecessary.

In your most recent letter you also requested the Commission's opinion whether state enforcement of requirements determined to be excepted from the preemption section of the Warranty Act by § 111(b) (1) preserving consumer rights and .remedies, is nevertheless barred by operation of the preemption provision. The Commission sees no reason why the state cannot enforce such requirements.

By direction of the Commission.

CAROL M. Thomas,
Secretary.

By direction of the Commission.

Issued: October 4, 1977.

APPENDIX H

[6750-01-M]

FEDERAL TRADE COMMISSION

PREEMPTIVE EFFECT OF SECTION 111(e)(1) OF MAGNUSON-MOSS WARRANTY ACT

Wisconsin Mobile Home Warranty Law

AGENCY: Federal Trade Commission.

ACTION: Response to request for opinion.

SUMMARY: Published below is a letter with an analysis which responds to a request of the Wisconsin Attorney General for Commission interpretation of section 111(c)(1) of the Magnuson-Moss Warranty Act and its pre-emptive effect on Wisconsin's Mobile Home Warranty Law. The Commission has determined that several State requirements are rendered inapplicable to warranties complying with Federal law by section 111(c)(l).

FOR FURTHER INFORMATION CONTACT:

Rachel Miller, Attorney, Division of Product Reliability, 202-523-0425, or Charles Taylor, Attorney, Division of Product Reliability, 202-523-3660, Federal Trade Commission, Washington, D.C. 20580.

SUPPLEMENTARY INFORMATION:

The letter and analysis follow.

Hon. Bronson C. La Follette
Attorney General
State of Wisconsin
Department of Justice
Madison, Wis. 53702

Dear Attorney General La Follette:

By letter dated February 22, 1978, you requested an opinion on whether any of the provisions of Wisconsin's

mobile home warranty law and regulations (§ 218.14 Wis. Stats. and IND 14.50 Wis Admin. Code) are subject to or preempted by section 111(c)(1) of the Magnuson-Moss Warranty Act, 15 U.S.C. 2311(c)(1). At the request of the staff, Assistant Attorney General James Jeffries supplemented your request by filing on March 16, 1978, an informal interpretation of the effect of the Wisconsin law. This letter is in reply to your request for a Commission opinion in this matter.

The Commission has concluded that the following two requirements of the Wisconsin law, and the related provisions of the regulations of the Wisconsin Department of Industry, Labor, and Human Relations, submitted with your request are affected by operation of section 111(c)(1) of the Warranty Act:

> (1) Disclosure in the written warranty of the address where notice of problems is to be given. Section 218.14(1)(c)(1), Wis. Stats. IND 14.50(2)(c).
>
> (2) Disclosure in the written warranty of the fact that unsuccessful repair is a breach of warranty, and that the consumer's right to proper repair continues regardless of whether the warranty period has expired. Section 218.14 (1)(e)(2), Wis. Stats.

These requirements are inapplicable to warranties which meet Federal requirements by operation of section 111(c)(1) of the Warranty Act.

Paragraph (2) of section 111(c) of the Warranty Act provides a procedure whereby States may petition the Commission for permission to enforce a State requirement which would otherwise be rendered inapplicable to written warranties complying with Federal standards by operation of paragraph (1) of section 111(c). Upon application of an appropriate State agency the Commission is required to initiate a rulemaking proceeding under section 109 of the

Warranty Act to determine if such State requirement affords greater protection to consumers than Federal requirements and does not unduly burden interstate commerce. If the Commission makes such a finding, the State requirement will be applicable to written warranties for so long as the State effectively administers and enforces such provision.

A copy of the Commission's analysis of the effect of the Warranty Act on the Wisconsin State law provisions is enclosed. If upon consideration of this matter you desire the public rulemaking proceeding described above, for consideration of the preservation of the two affected statutory provisions, you should submit an application. pursuant to section 111(c)(2) of the Warranty Act to the Secretary of the Commission.

You are invited to contact Rachel Miller, Attorney, Division of Product Reliability, 202-523.1753, or Charles Taylor, Attorney, Division of Product Reliability, 202-523-3660, Federal Trade Commission, Washington, D.C. 20580, should you have any questions concerning this matter.

By direction of the Commission.

[Signed]

CAROL M. THOMAS
Secretary.

Enclosure.

ANALYSIS OF SECTION 111 OF MAGNUSON-MOSS WARRANTY ACT AND APPLICABILITY TO WIS= CONSIN MOBILE HOME. WARRANTY LAWS

Section 111(c)(1)[1] of the Magnuson-Moss Warranty Act ("the Warranty Act") provides that certain types of State warranty requirements are inapplicable to written warranties complying with the Warranty Act. Section 111(c)(2)[2] provides that an appropriate State agency may apply to the Commission for an exemption of any State warranty requirement from the pre-emptive effect of paragraph (1) of that section. Such an exception may be granted if after public hearings the Commission determines that the requirement meets the criteria set out in paragraph (2).

The Attorney General requests a Commission interpretation of paragraph (1) of section 111(c) and an opinion stating which provisions of Wisconsin's mobile home warranty requirements are affected by that paragraph. He has not requested exemption of any such affected requirements as provided in paragraph (2) of section 111(c); therefore the

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[1] Section 111(c)(1). "Except as provided in subsection (b)and in paragraph (2) of this subsection, a State requirement-(A) which relates to labeling or disclosure with respect to written warranties or performance there-under; (B) which is within the scope of an applicable requirement of sections 102, 103, and 104 (and rules implementing such sections),and (C) which is not identical to a requirement of section 102, 103, or 104 (or a rule thereunder), shall not be applicable. to written warranties complying with such sections (or rules thereunder)."

[2] Section 111(c)(2). "If, upon application of an appropriate State agency, the Commission determines. (pursuant to rules issued in accordance with section 109) that any requirement of such State covering any transaction to which this title applies (A) affords protection to consumers ;greater than the requirements of this title and (B) does not unduly burden interstate commerce, then such State requirement shall be applicable (notwithstanding the provisions of ,paragraph (1) of this subsection) to the extent specified in such determination for so long as the State administers and enforces effectively any such greater requirement."

rulemaking procedure specified in the Act for exemption applications is not applicable in this instance. The Attorney General may choose later to request or not to request an exemption under the procedure of paragraph (2) for any provisions of Wisconsin law which the Commission determines are affected by section 111(c)(1) of the Warranty Act.

This analysis builds on the findings made by the Commission in the California determination,[3] which first considered the effect of the Magnuson-Moss Warranty Act on State warranty requirements. In general, the protections of the Warranty Act are in addition to, rather than in lieu of, warranty rights and remedies under State law.[4] Only a very narrow class of State requirements are "preempted" (that is, made inapplicable to warranties complying with the Federal requirements).

The Commission has already made clear that, while allowing the use of uniform warranty documents is a goal of section 111, this goal is subordinate to that of permitting States to fashion their own scheme, or warranty rights and remedies which may be more protective than the minimum level of protection of the Federal Act. Only State requirements which have certain specific characteristics are affected by the Federal Act. Those characteristics are: that the requirement does not create a right or remedy for consumers;[5] that it relates to written warranty labeling or disclosure;[6] that it is within the scope of a requirement of sections 102, 103, or 104 of the Warranty Act, or rules under

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[3] Commission's Determination of Application of State of California, 42 FR 54004, Oct. 4, 1977 (hereinafter "California").

[4] Section 111(b)(1). "Nothing in this title shall invalidate or restrict any right or remedy of any -consumer under State law or and other Federal law."

[5] Section 111(b)(1).

[6] Section 111(c)(l)(A).

one of these sections;[7] and that is not identical to that requirement.[8] Only if a State requirement has all these characteristics is it "preempted," or rendered inapplicable to warranties complying with Federal law, under section 111 of the Act.[9]

Thus, a State provision which merely creates consumer rights or remedies, without providing for disclosure of them,[10] would be entirely unaffected by the Warranty Act; that is, it would not be subject to "preemption." A provision which both creates a consumer right or remedy, and provides for its disclosure to consumers,[11] must be considered in two stages. The underlying right would continue to be effective in spite of any similarity with or difference from the Federal Act, since section 111(b) specifically pre-serves such rights and remedies. On the other hand, the method of disclosure of that right provided for in the State law must be considered as to whether it has the final two characteristics. If it does, then the method of disclosure in the State law is "pre-empted," though the underlying consumer right remains in effect. The Commission adopted this interpretation of section 111 in the course of its California determination because it is the only interpretation which gives meaning to both paragraphs (b) and (c) of that section and is consistent with the Act's legislative history.

In the California determination, the Commission defined the scope of its rule on disclosure of warranty terms, 16 CFR Part 701, to include any requirement that information appear

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[7] Section 111(c)(1)(B).

[8] Section 111(c)(1)(C).

[9] See California, Section II.

[10] For example, the UCC implied warranty of merchantability.

[11] For example, the requirement that repairs under California's statutory mobile home warranty be performed at the site of the mobile home.

in the warranty document itself.[12] The scope of the Federal labeling requirements, while discussed in the California determination, is not at issue in this analysis of Wisconsin law.

The California determination did not explicitly discuss the meaning of the last characteristic, that the State provision be "not identical to" a Federal disclosure or labeling requirement, although this was implicit in a number of determinations concerning mobile home requirements.[13] Its precise meaning is particularly important where, as here, a State law mandates the giving of a written warranty with certain specified terms.

The Commission interprets "identical to" to mean "having the same effect as" or "resulting in the same disclosure as." If the item of information required by the State to be disclosed in the written warranty would also be disclosed under a Federal disclosure provision, the State requirement is "identical to" the Federal requirement for purposes of section 111. It is not essential that the State provision contain the same words as the Federal provision, or incorporate the Federal provision by reference.

The Commission's rule on warranty disclosure[14] requires that up to 10 enumerated elements of a warranty be disclosed. Usually the manufacturer is free to choose the terms of a written warranty. However, when State law mandates that the written warranty contain certain terms, those mandated terms become terms of the warranty and thus must be disclosed under the Commission's rule. For example, when a State mandates a written warranty with a 1-year duration,[15]

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[12] California, p. 54005.

[13] See Staff's Analysis, California Initial Notice, 41 FR 28361, at 28366, and text accompanying n. 27 (July 9, 1976).

[14] 16 CFR 701.3(a), 701.4.

[15] See, e.g., California Civil Code §1797.3(b).

that duration must be disclosed under the Commission's rule. Since the 1-year duration of the warranty would have to be disclosed under both State and Federal law, the two requirements are "identical" requirements for purposes of section 111(c)(1).

On the other hand, if the mandatory provision which the State requires to be disclosed is one which the Federal rule does not require to be disclosed, such as a telephone number for giving notice of defects under the warranty,[16] then the State disclosure requirement is not identical to the Federal requirement. Thus if the State law requires disclosure of a term which is not 1 of the 10 elements enumerated in the Commission's rule, then the provision is rendered inapplicable to warranties complying with the Federal rule.

APPLICABILITY TO WISCONSIN MOBILE HOME WARRANTY LAWS

The following paragraphs discuss the specific provisions of the Wisconsin mobile home law[17] and whether or not each is made inapplicable by section 111(c)(1) to warranties complying with the Federal Act, and why. In each case, only the disclosure or labeling aspect is discussed; the underlying rights created by State law cannot in any case be invalidated or restricted by the Federal Act by virtue of section 111(b)(1).

SECTION 218.14(1)

Requires giving buyers a written warranty with certain mandatory terms on mobile homes. The requirement of disclosure of the existence of the warranty is not within the scope of the Federal, disclosure rule, which merely estab-

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[16] See, e.g., California Civil Code § 1797.3(d). Note that this provision, other-wise preempted, was preserved under the Commission rulemaking procedures of sec. 111(c)(2).

[17] Sec. 218.14. Wis. Stats; Ind. 14.50 and 14.56 Wis. Admin. Code.

lishes what must be disclosed in the warranty once the initial decision to issue a written warranty is decided.

Requires the mandatory 1-year duration to be disclosed. This provision requires the same information to be disclosed as 16 CFR 701.3(a)(4), that is, the duration of the written warranty. Thus it does not meet the "not identical" condition of section 111(c)(1)(C). The State requirement, therefore is not "preempted" or rendered inapplicable to warranties complying with Federal requirements. (Note that the mandatory 1-year duration itself is a consumer right which is preserved by section 111(b)(1).)

SECTION 218.14(1)(a)

Establishes the characteristics or properties which are covered by the mandatory warranty, specifically, that it meet certain standards. This provision requires the same disclosure in the warranty as 16 CFR 701.3(a)(2), "[a] clear description and identification of * * * * characteristics, * * * or properties covered by * * * the warranty." It therefore is not affected by section 111(c)(1) of the Warranty Act.

SECTION 218.14(1)(b)

Establishes the characteristics or properties of the product which are covered by the warranty, specifically, that the product be defect-free and habitable. Like paragraph (a), this provision requires the same disclosure as 16 CFR 701.3(a)(2), and is therefore not affected by section 111(c)(1) of the Warranty Act.

Defines "reasonable care and maintenance." By letter of March 16, 1978, Mr. James D. Jeffries, Assistant Attorney General of Wisconsin, informed the staff informally that this definition need not appear in the written warranty document. Under this analysis it is not a disclosure or labeling requirement and is unaffected by section 111(c)(1) of the Warranty Act.

SECTION 218.14(1)(c)(1)

Defines who is responsible under the warranty. This provision requires a disclosure included in those of 16 CFR 701.3(a)(5), that is, identification of the warrantor in the warranty; therefore this requirement is not affected by section 111(c)(1) of the Warranty Act.

Requires disclosure of the warranty duration. Like section 218.14(1), this requirement is not affected by section 111(c)(1) of the Warranty Act.

Requires disclosure of the time within which the consumer must give notice of problems. This requires a disclosurre included in those required by 16 CFR 701.3(a)(5), that is, disclosure of what the consumer must do to get warranty service, and therefore is not affected by section 111(c)(1) of the Warranty Act.

Requires disclosure of the address where notice is to be given. This requirement is within the scope of 16 CFR 701.3(a)(5), but not identical to it. The Federal provision permits warrantors to include in the warranty a toll-free telephone number where warranty information may be obtained or where notice of defects may be given in addition to or instead of an address. Since the address is not required under Federal law if such a telephone number is given, this provision of Wisconsin law will not apply to warranties which meet the requirements of Federal law, by operation of section 111(c)(1) of the Warranty Act. The State of Wisconsin may file an application for preservation of this provision under the savings provision of section 111(c)(2) of the Warranty Act.

Requires disclosure that repairs will be made within 30 days of notice of the problem. This provision requires a disclosure included in those required by 16 CFR 701.3(a)(3). The latter provision requires a statement of what the warrantor undertakes to do under the warranty. Although usually

a warrantor is not required to commit itself to performing within a set time, where by law or by choice the warrantor is commited to a certain time for repairs, that time becomes part of its undertaking to be disclosed under the Federal requirement. Therefore the State requirement is not affected by section 111(c)(1) of the Warranty Act.

Requires disclosure that repairs will be performed at the mobile home site. Like the previous requirement, this provision requires a disclosure also required by 16 CFR 701.3(a)(5).

Requires that manufacturers reimburse dealers for warranty repairs. Assistant Attorney General Jeffries has advised that this provision need not be disclosed in the warranty. Therefore, it is not a disclosure or labeling provision and thus is unaffected by section 111(c)(1) of the Warranty Act.

SECTION 218.14(1)(c)(2)

Requires disclosure of the fact that an unsuccessful repair is a breach of warranty, and that the consumer's right to proper repair continues regardless of whether the waranty period has expired. This disclosure requirement is not identical to any requirement of the Federal Act, and therefore it does not apply to warranties which meet the requirements of the Warranty Act. The substantive right created by this provision remains in effect; it is merely the requirement that the right be disclosed in the written warranty which is made inapplicable. The State of Wisconsin may file an application for preservation of this provision under the savings provision of section 111(c)(2).

SECTION 218.14(1)(d)

Requires disclosure of manadatory extension of the warranty for the amount of time the home is uninhabitable. This provision requires a disclosure included among those required by 16 CFR 701.3(a)(4), the measurement of warranty dura-

tion. This provision and section 218.14(1) establish that the mandatory duration of the warranty is 1 year's time during which the home is habitable. The provisions require further that this duration be disclosed; such a disclosure requirement is thus identical to the Federal requirement that the duration of a warranty be disclosed.

The other provisions of the Wisconsin law do not contain any requirements relating to disclosure or labeling, and are therefore unaffected by section 111(c)(1) of the Federal Act.

The following paragraphs discuss the effect of the Warranty on those Wisconsin administrative regulations[18] concerning mobile homes which differ from the Wisconsin mobile home law.

IND 14.50(2)(a)(1)

Requires disclosure of the fact that alterations not approved by the regulating agency can affect the continued validity of the warranty. This provision is a statement of parts, characteristics, components, and properties which are excluded from the warranty, which must be disclosed under 16 CFR 701.3(a)(2). The State requirement is therefore within the scope of the Federal provision but identical to it, and so is not affected by section 111(c)(1) of the Warranty Act.

IND 14.50(2)(a)(1)a

Requires disclosure of the fact that such alterations are not covered by the mandatory warranty. This also requires disclosures which 16 CFR § 701.3(a)(2) would require, and is not affected by section 111(c)(1) of the Warranty Act.

IND 14.50(2)(a)(1)b

Gives a definition of "alteration." In the above-mentioned letter of March 16, 1978, Mr. Jeffries stated that the regu-

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[18] IND 14.50, Wis. Admin. Code.

lation requires this definition to appear in the warranty document. This is merely a detailed description of those characteristics, etc., which are excluded from the warranty, and is not affected by section 111(c)(1) of the Warranty Act.

IND 14.50(2)(g)

Requires disclosure of the date of delivery of the home, on which date the warranty begins. This requires the same disclosures as 16 CFR 701.3(a)(4) requires, that is, disclosure of the date of commencement of the warranty if other than the date of purchase. Therefore the provision is not affected by section 111(c)(1) of the Warranty Act.

The other provisions of the regulation, IND 14.50 and 14.56, either do not concern labeling or disclosure, or are the same as those of the mobile home law and are affected as discussed above.

In summary, the following requirements of the Wisconsin mobile home law and regulations are rendered inapplicable to warranties which comply with the federal warranty requirements, by operation of section 111(c)(1) of the Warranty Act:

(1) Disclosure in the written warranty of the address where notice of problems is to be given. Section 218.14(1)(c)(1), Wis. Stats; IND 14.50(2)(c).

(2) Disclosure in the written warranty of the fact that unsuccessful repair is a breach of warranty, and that the consumer's right to proper repair continues regardless of whether the warranty period has expired. Section 218.14(1)(c)(2), Wis. Stats.

The other disclosure requirements of the law and regulations, as well as their substantive rights and remedies, are unaffected by section 111(c) of the Magnuson-Moss Act.

Wisconsin may apply to the Commission, under the procedure in section 111(c)(2), for preservation of either or both of the affected requirements. Those requirements will be

preserved which the Commission finds, after a rulemaking proceeding under section 109 of the act, afford protection to consumers greater than the requirements of the Warranty Act, and do not unduly burden interstate commerce.

By direction of the Commission dated September 28, 1978.

CAROL M. THOMAS,
Secretary.

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